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IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.
_____/

Miami-Dade County Courthouse
Miami, Florida,
Wednesday, 1:30 p.m.
June 23, 1999

TRIAL - VOLUME 346

The above-styled cause came on for trial before the Honorable Robert Paul Kaye, Circuit Judge, pursuant to notice.

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APPEARANCES:

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SUSAN ROSENBLATT, ESQ.
On behalf of Plaintiffs

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ROBERT C. HEIM, ESQ.
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On behalf of Defendant Philip Morris

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On behalf of Defendant Brown & Williamson

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On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard

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On behalf of Defendant The Council for Tobacco Research

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(APPEARANCES - Continued)

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(Whereupon, the following proceedings were had:)

THE COURT: Have a seat, folks.

Okay. I just want to make a short note for you all. Since I have nothing to do up here but listen to what you are doing, I was reviewing the jury instructions. There's a couple of typographical errors I want to correct and get a corrected version.

So, let me just give you the page number.

On Page 6, in the first long paragraph, it started to read -- and I'll go up the line. I think it's 1, 2, 3, 4, 5, 6, 7, probably 8 or 9 lines from the bottom where it started. It says, "The tobacco industry." It should have read, "The plaintiffs also allege that the tobacco industry."

And then I changed the word, instead of "that later became" to "which later became."

So that's on Page 6. You'll see that.

And on Page 7, on the second paragraph or the first full paragraph, which starts "On the claim of negligence, the issues are," they had issue one and then they had issue three. They had the numbers mixed up. So we changed the numbers. So it should read: One, two, three, four, five, rather than one, three, four, five and six.

So it's just a typographical thing. You'll

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get copies of the corrections on this.

But I'll probably find a lot more in here as I read through it.

MR. HEIM: Your Honor, you pointed out the class definition was not the class definition that --

THE COURT: I didn't -- I don't know where we are.

MR. HEIM: What I said, Nancy, is, we pointed out that the class definition was not the actual class definition that the Court --

THE COURT: That probably would be on Page 1, which probably needs revision.

MR. HEIM: Yes.

THE COURT: I will have to go back and look at the complaint, which is a problem with leaving it for others to do.

MR. HEIM: Sure.

THE COURT: All right. We'll see.

Okay. I guess we're ready. Bring the jury out, please.

THE BAILIFF: Bringing in the jury. Jurors entering the courtroom.

(The jury entered the courtroom.)

THE COURT: All right. The jury is present and accounted for.

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You all may be seated. Thank you.

You can resume.

MR. HEIM: Thank you.

Good afternoon, everyone.

JURY PANEL: Good afternoon.

MR. HEIM: Okay. The plaintiffs have made a claim in this case for an award of punitive damages, and what that means is they want to be placed in the position to collect money for punishing the companies for their conduct over the course of time.

And they say, in effect, that Philip Morris and the other companies ought to be punished by this, being put in a position to collect these punitive damages, because they're the kind of companies that ought to be punished.

And I'm here to tell you that that's about as wrong as it can be, because the conduct of these companies dealing with a legal product that has risks with it, and which everyone has known for almost as long as tobacco and smoking tobacco has been around, these companies have worked and worked with that product to make it as safe as they can make it.

So when you're thinking about judging companies about their conduct, I ask you to consider, as I said early this morning, what did the companies

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do? I ask you, what did the companies do? What actually did they do, confronted with a product -- selling a product with risks, what did they do to try to make that product as safe as it can be made?

And I ask you to judge the efforts of guys, people like Harold Burnley, people like Brad Scott. Brad Scott was the first witness in the case, a fellow that grew up in the tobacco farm.

People like Cliff Lilly, Dr. Cliff Lilly, Richard Carchman, people who have spent their lifetime, literally their whole professional lives, taking a product with risks and doing what they could to make it as safe as it could be made.

So because they, the plaintiffs, say this is a company that we ought to award or get in a position to award money for punishment, I want to spend a little bit of the time that I have left telling you about what kind of company Philip Morris really is.

I'm going to do that because of the evidence, and I want to do it -- I really want to do it -- I want to do it for the people of Philip Morris. I want to do it for the employees. I want to do it for the tens of thousands of people that spend their lives --

MR. ROSENBLATT: Objection, Your Honor. This is outside the evidence.

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THE COURT: Hold on one second.

MR. ROSENBLATT: The tens of thousands of employees --

THE COURT: Whoa. Let me see what's going on. I'm sorry. I was talking to the clerk for one second.

MR. HEIM: There's testimony on this.

MR. ROSENBLATT: This might need a sidebar, Judge.

THE COURT: Yes.

(The following proceedings were had at sidebar:)

MR. HEIM: This objection was made on --

MR. ROSENBLATT: Let me, since I --

MR. HEIM: I'm sorry. I don't want --

MR. ROSENBLATT: Go ahead. I don't care.

MR. HEIM: You may remember, Your Honor, that I asked Mr. Morgan this question about the employees of Philip Morris during his testimony, and there was an objection made, and Your Honor overruled the objection. You said, no, he can testify about the company and how many employees and its shareholders. And that's all -- that was one sentence I was going to go -- that was all I was doing.

THE COURT: I was looking to see what the

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objection was.

MR. HEIM: That was the objection.

MR. ROSENBLATT: I noticed Your Honor was answering the question up here, and I didn't know if you focused in at that particular moment, but Mr. Heim laid basically a predicate, and now he was going to talk about Philip Morris, the company that the plaintiffs are asking that you punish, and I knew what was coming. What was coming is we're a great company and we employ a huge number of people and we pay taxes and I just -- I just want the Court to be -- you know, I prefer -- and that's very unusual for me to call a sidebar, but I preferred that to jumping up. Mr. Heim telegraphed what's coming.

THE COURT: Here's what the problem is. In this first stage, all we're talking about is an entitlement. It's not even necessarily so that they will, in fact, award punitive damages on the basis of --

MR. HEIM: I understand.

THE COURT: -- of anything else that may follow. So it's just an issue of entitlement. So if what you're saying is on behalf of Philip Morris and the people that make up the Philip Morris family, whatever it may be --

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MR. HEIM: That's all I'm doing.

THE COURT: -- we don't think you should blah, blah, blah.

MR. HEIM: That's all I was doing.

THE COURT: That's fine.

MR. HEIM: I was going to finish that sentence and go on.

THE COURT: That's no problem. I don't have any problem.

MR. ROSENBLATT: You're not going to talk about all of the great things Philip Morris does in terms of charity?

MR. HEIM: No. I wasn't going anywhere near there.

MR. ROSENBLATT: That's fine.

MR. HEIM: It's an idea, but I wasn't --

THE COURT: Okay.

MR. ROSENBLATT: It's an idea that I didn't have to give you.

THE COURT: All right. Overruled.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

MR. HEIM: As I was saying, I want to do it because of the thousands of employees, the tens of thousands of employees of Philip Morris.

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That's another reason why I want to tell you about what kind of company Philip Morris is. And I'm going to do it real fast because I've been told over lunch that I'm already, by my colleagues, that I'm already past the time that I have. So I'm -- this is going to be a real quick ride. So I'm going to do it in three areas real fast.

And they are the area of ingredients, the area of Philip Morris's approach toward nicotine and its new product development. I'm just going to take those three for now, because Mr. Reid is going to speak very, very shortly. He's going to talk about all of the efforts by all of the companies to use their technology and their science to do what they can on health risks of smoking.

Now, on ingredients, the reason I brought testimony to you about ingredients, ingredients make up about six percent, and I'm going to use this thing to try to go fast -- ingredients make up about six percent of what's in cigarettes. 94 percent roughly is tobacco, and the other is ingredients.

And because there was some reference to ingredients, and I thought some of you might have thought to yourself: Well, you don't show the ingredients on the pack. How do I know the ingredients

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are safe?

Coca-Cola doesn't show natural flavor. They say natural flavors. They don't tell you what they are.

Well, the tobacco companies, they don't tell you what the ingredients are. And it would have been a fair question -- it would have been a fair question if you're sitting back saying: Tobacco, okay, I know what tobacco is, but I want to know what's the other six percent.

And they come in six categories, and you saw this before in Dr. Carchman's testimony. They are humectants, which are the things that make cigarettes moist and flavors. That's what ingredients are.

And Philip Morris, and every one of the other companies, has an elaborate program to test every one of those ingredients before they go into a cigarette.

And they get tested separately from the tobacco, and each and every one of them -- Dr. Carchman told you one ingredient they can test for two years and spend $2,000,000 before they're satisfied that that ingredient is absolutely safe.

And it's important to know that the ingredients are safe. And there is an elaborate testing protocol to do just that.

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This is the protocol that was set up on January 12th, 1981 at Philip Morris. And all of the companies test these additives the same way. This entire evaluation process is governed by a very conservative philosophy, which implies that we have shown due diligence in our efforts to avoid harm to our customers and to avoid embarrassment to the company in the marketplace. But to avoid harm to our customers. Very first thing.

And that's what they do with their ingredients. That's, by the way, Defendants' Exhibit -- for those of you who are looking at them, writing things down, Defendants' Exhibit 5745 is the protocol for testing ingredients that's used by Philip Morris.

And when you look at that protocol, you'll see how elaborate it is. It's full of looking at chemistry and checking through lists that are used anywhere in the world.

And if there's any hesitation, if there's any question, if any country anywhere in the world says, "No, we don't like that ingredient," it comes out. They don't use it. Because they want to know that the problem -- the health risks come from tobacco, they want to make sure there are no health risks that come

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from ingredients. And that is a very elaborate protocol that deals with biological testing and chemistry and virtually every kind of test that you can think of.

But the companies wanted to make sure -- and you remember, Dr. Richmond testified: Well, they wouldn't give me the list of ingredients back in 1979. But he said: But they had a right to be concerned about the confidentiality of it, because each company -- what makes a Marlboro a Marlboro is a lot of the flavors that's in it. And he said: They had a right to be concerned about that.

All of the companies submit their ingredients list to the Department of Health and Human Services, so the government knows about it. The governments require -- that department is required to tell Congress if any ingredient that's used by any of the companies is a concern, is a problem.

There's a report. They have to make a report, and if it's a problem, there's a report that's required. And there's never once been a problem reported with any of the companies' ingredients.

But just to make sure, because the companies are mindful that consumers, the smokers, their customers, might be saying, "Aha, what's in those

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ingredients? You know, you're not showing them," we want to be sure. And just to be sure, they sent them to six independent toxicologists. And what did these toxicologists do? Well, the toxicologists looked at them and they issued a report.

And this was the report by the six independent toxicologists in March 1994, and I guess I'll give you the exhibit number for that. It's Exhibit 5851, is the exhibit number. Exhibit 5851.

And this was done because, you know, people were saying: Well, how do we know? So they sent them out. No one has ever criticized that -- that these were totally independent toxicologists had nothing whatsoever to do with tobacco companies.

And the toxicologists said two things. They said: You know, it's important that the company use ingredients because it helps make the lower tar cigarettes acceptable to consumers, to smokers, because what happens is that your tar and nicotine levels go down, and Mr. Reid is going to show you how much they've come down. Some smokers find them less acceptable in terms of taste because nicotine has a taste.

So they said: It's important that they use these ingredients because it helps consumers buy the

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lower tar, lower nicotine cigarettes.

And then they conclude: The authors of this report examined extensive published and unpublished toxicological, metabolic -- and however you say that other word -- data on the ingredients and found none to be potentially toxic at levels of use.

And then you can read the conclusion on there.

So the work that the companies do, it is an extensive, elaborate, hard-testing program, to make sure that a smoker, while there are risks to smoking, and the smoker is warned of the risks to smoking, the smoker doesn't have to worry about ingredients that go into tobacco because the companies test them so carefully and so well.

Now, the next topic that I wanted to talk about, and I said the next topic. The next topic is Next.

And Next, if you remember, is the cigarette that -- I will get that off the screen.

Next is the cigarette that Philip Morris put on the market that failed; that they spent an enormous amount of money on, $300 million using a special process that they got from General Foods to take the nicotine out of tobacco.

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And I think you remember Dr. Lilly who came in and explained that, how they did that, with using the same process that Maxwell House used for taking caffeine out of coffee.

And Dr. Lilly, to try to remind you, was a white-haired gentleman who -- he's the guy who got the watch from the metal society, that he keeps in a sock drawer, for inventing a new metal, for Philip Morris' Accord cigarette that I'll talk about real quickly.

And Dr. Lilly, the -- who's been with the company, I think I said earlier, 33 or 35 years, came in and the point -- the reason I tell you this is that there are claims that Philip Morris manipulated nicotine and tried to use nicotine to hook people.

And one of the -- the point of me doing this in the very little bit of time that I have is trying to convince you and persuade you that that just isn't so; that the company -- the only manipulation the company did was to reduce it on the one hand, or try to eliminate it on the other. That's what manipulation consists of.

And even Dr. Benowitz said, when he was here, testifying for the plaintiffs: Yeah, you know, if you -- manipulate means changing it, and if what you did was lowering it, well, maybe that's manipulating

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it, but there's nothing wrong with that.

And that is right. There is nothing wrong with that.

So I want to say it flat out. We didn't -- and maybe the fastest way to do this is to -- well, I've jumped ahead here, but that's okay.

I just want to say, Philip Morris has never spiked -- Philip Morris doesn't spike nicotine. None of the other companies do. And I didn't show you this earlier, or maybe I did, but this was the testimony -- this was the testimony of Dr. Uydess, this subject on spiking, and that was on November 24th, 1998:

As far as you know, these allegations of spiking are not true?

Yes. Absolutely. And it was nothing that I would have ever expected a company like Philip Morris to ever think of, let alone do.

And that gives you an idea of what he thought -- you know, the research effort and work of Philip Morris, they wouldn't even think of, let alone do. And that's Dr. Uydess, when he was here.

So Philip Morris did not do what it was charged with having done, with spiking nicotine.

It didn't use ammonia to increase the pH of smoke. That's clear, both from Dr. Benowitz' testimony

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earlier, and from Harold Burnley, when he came here and he said: Gosh, almighty, if that were true -- you know, we do use ammonia in Marlboro and the reconstituted tobacco for Marlboro, but we use it in a bunch of other brands, true, and if that was true, all those other brands would sell like Marlboro, and they don't.

So it's just common sense tells you that ammonia doesn't have anything to do with Marlboro's success, despite what other tobacco companies might have speculated about.

And just flat out, that charge hasn't been proven.

And I just want to ask you this question. Would you think that if Philip Morris -- would you think that if Philip Morris was out to addict smokers to nicotine, and if they believed nicotine was addictive and wanted to hook smokers, or even if it just believed that nicotine was the only reason people smoked, if Philip Morris believed any of those things, would it have spent $300 million to try and get a product out there on the market for people who didn't want nicotine in their cigarettes?

That makes no sense at all. That would make no -- absolutely no sense at all. And yet here is a

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company that came along -- and all of the companies now have products out with extremely low nicotine, so I want to say it on behalf of all of the companies, but Philip Morris's effort to put Next on there, get it out there, sell it, spend it, develop it, you'll never see anyone more committed than Dr. Lilly, than Cliff Lilly, and the president of the company, as he testified, to doing that.

He said: We believe we can do this.

And it didn't work, and I'm sure you're going to hear about it. I'm sure, you know, in rebuttal you'll hear: Well, it didn't work, and doesn't that prove that, you know, regardless of what you might have thought, doesn't it prove that people smoke just for nicotine?

And that's -- you know, I'd be very surprised if you didn't hear that.

And that's why, when Cliff Lilly was up on the witness stand I asked him just that question. I said: Dr. Lilly, you spent all that money. You put the cigarette out there. You sold it right here in Florida in Tampa, and people bought it one time, and then they didn't come back and buy the next pack. You know, doesn't that prove -- whether you remember, I said: Doesn't that prove that people just smoke for

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nicotine?

And he said: Well, that's certainly a theory. And he said: And it certainly shows -- you know, you can jump to that conclusion.

But the problem with it is, he said, the problem with it is, is when we were trying to fix it, we added the nicotine back -- we added nicotine back to see if that would help with the taste of the cigarette, and it didn't.

He said: We tried taking out less in the laboratory. We did all this in the laboratory, and none of those things worked. He said: So what I think it was, I think part of it was that smokers may have missed some of the pharmacology, you know, the feeling that you get. He said: I thought that was part of it.

He said: I thought the other part of it was that when we use that super critical carbon dioxide process for stripping the nicotine out, we took more out than just nicotine. We took things out that made tobacco tobacco, and that's why smokers rejected it.

And he said: You know what? We haven't given up. Our new thing is we're trying to genetically reengineer the tobacco plant, to grow it without nicotine.

And that's Philip Morris. That's what Philip

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Morris conducted that they -- you know, that they say, this is punishable conduct. That's the people of Philip Morris.

So, then, there's finally -- there's, again, a product -- and it's no surprise that Dr. Lilly has done many -- most of these things because he's been a senior research fellow at the company, Cliff Lilly.

But he told you about how they -- how the company developed Accord. And he said: Sure, it's clunky.

He agreed it's a little clunky when he was being cross examined by Mr. Rosenblatt. He said: Yes, you're right, I don't think you're going to see a lot of people in bars with it -- you remember that -- over the next year or two because it looks a little funny, smoking it like that.

But he said: You know, we're doing all right with that in Richmond. They're selling a lot of them in Japan and we're going forward with it. And Cliff Lilly said: I believe that in ten years, this will be a very, very important product.

And when you look at what it does, when you look at what this product does -- and I'll try to show it to you real fast.

Let's see what I do here. Oops. Wrong one.

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Well, that's it.

Look at the reductions. Amazing reductions. I think Dr. Lilly showed you these, or Dr. Carchman, the amazing reduction in biological activity of this cigarette, or it's an unconventional cigarette. I don't know whether you should even call it a cigarette. But calling it a cigarette, look at it. It's really remarkable.

This is what this is, electrically heated. It doesn't burn tobacco; it heats it instead, to keep the temperature down under 500 degrees. And that's the kinds of reductions you get down from 100 percent to 3 percent in mutagenicity.

There is the in vitro testing that I talked about earlier.

So truly remarkable, remarkable achievement, one that where Dr. Lilly, in conjunction with the government, had to invent a new metal to make this because you couldn't do it with the old one.

And look at this, comparing it to a conventional cigarette: Benzopyrene, four percent, instead -- four percent of what it is in a conventional cigarette. You see the blue is this electrically heated cigarette.

A remarkable, remarkable accomplishment that

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took years and years. They started -- actually, the concept began back in 1961. That's how long it took.

It needed computer chips to run this lighter. But a remarkable -- that's the people of Philip Morris. That's the commitment that this company has over the years, to try and get cigarettes to be as safe as you can make a cigarette.

Well, I said I'd try to end in 15 minutes, and I'm pretty up close to my 15 minutes. But I just --

Yesterday, a comment was made about if you look at Philip Morris, you won't find a single document showing a concern for health. I think Mr. Rosenblatt said that. Either he said it or he quoted a witness as having said that.

And I just shook my head, because one of the documents that had already been shown or was about to be, I think it must have already been shown, one of the documents that was -- part of it was read to you, was this 1958 document, Plaintiffs' Exhibit 548; and at the bottom of this document -- this was after some of the reports had come out about the concerns about smoking and disease, and one of the early reports was benzopyrene, and you've heard a lot about it. One of the early reports.

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And this fellow is writing, and he's very, very upset. This is the document about having a complex about: What are we doing? Are we selling a product that actually causes these diseases? And he writes this:

The compound. The analysis above leads to the following conclusion. Benzopyrene must go. This compound must be removed from Marlboro and Parliament, or sharply reduced. We must do this -- this is 40 years ago now -- we must do this, not because we think it's harmful, but simply because there are those who are in a better position to know than ourselves, suspect it may be harmful. Other ingredients that might be harmful must also go. But benzopyrene should go first because it's the one that seems to be under most suspicion at the moment.

That's 40 years ago. Benzopyrene must go.

And then another document that was shown to you yesterday. One of these pages in here was read. It's Plaintiffs' Exhibit 1992. And I think I showed this to you during the course of the case.

This was a presentation made by Dr. Helmut Wakeham in New York. And it goes through, you know, all kinds of -- a long table of contents. It's a long document. This is the point I'm making about

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documents. You know, you can say -- make one point about it and then find another page and make another point about it. And if you don't look carefully, you really don't know.

But I just want to go to the last two pages, because -- and the last two pages of that document talks about possible ways to remove -- to reduce carcinogens in tobacco smoke.

And he comes up with a list of things. And this is -- this is the program for research and development. And he talks about discovering precursors for them, discovering mechanisms or conditions by which they're produced, finding experimental tobaccos.

And he goes through a whole bunch of things. And then at the end he says -- I don't know whether I have this on one of these. I wanted to show it to you. There it is.

At the bottom: A medically acceptable -- a medically acceptable low-tar carcinogen cigarette may be possible. Its development would require time, money, unfaltering determination.

Richard Carchman came in here and he said: That has been the model for Philip Morris, as he's known it; that the company has spent the time and the money, 600 scientists working on making a safer

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cigarette.

That's the Philip Morris company that I want you to know. Scientists in the United States, scientists in Switzerland, scientists in Germany, but all working to make cigarettes as safe as they can be.

This is an attempt to take a product with risks, a product that people know of risks, there it is, warnings and all of the sources for which people know and expect that cigarettes have risks, but it's to take a product with risks and to work and work. Time, money, unfaltering determination. People are going to smoke. They've smoked for a century. Let's make cigarettes as safe as we know how. That's being responsible. That's a responsible company, with a responsible effort. And that's Philip Morris.

Thank you.

THE COURT: All right. Who is the next speaker?

MR. REID: Me.

THE COURT: All right, sir. Mr. Reid.

MR. REID: Thank you, sir.

MR. HEIM: Your Honor, I misspoke. I gave an exhibit number of 1992 for the last exhibit, and I'd like the jury to know it's 4992, not 1992.

THE COURT: 4992.

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MR. HEIM: 4992.

THE COURT: Thank you, sir.

MR. REID: Good afternoon, ladies and gentlemen.

JURY PANEL: Good afternoon.

MR. REID: I'm Ben Reid, along with Rick Kirby over there in the red tie. We didn't wear red ties together on purpose today. We represent the RJ Reynolds Tobacco Company.

And there are a number of topics that I'm going to talk with you about today. And I'm going to start with fraud.

And I've been sitting there the last couple of days as Mr. Rosenblatt made his argument, and I was thinking about what he said, what he was saying. And I think it comes down to this.

The plaintiffs are claiming that since 1950, it has been an undeniable scientific fact that smoking caused disease, and anybody who disagrees with that since 1950 is guilty of fraud.

The plaintiffs wanted everybody to accept their interpretation, their viewpoint, without further comment. And, you know, this morning, Mr. Heim mentioned a word that I thought was interesting. He mentioned the word "heresy." And I'm sure you all

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remember heresy. Those were the trials back during the inquisition where people were tried because of what they believed. They were tried and punished because of what they believed.

And you know, I think in some ways, that's what this trial is about. Plaintiffs brought in expert witnesses, put them on the stand, went through their CV's extensively, and then just said: Okay, does smoking cause disease? And the answer was always yes. No explanation. Everybody in the public health community believes that. Must be true.

And if you think back through all of the witnesses you heard in their direct testimony over and over, it was always that pattern. Long CV. Does smoking cause -- fill in the blank -- whatever disease, and you'd hear a list of diseases.

And anybody who disagrees with that we'll brand as a heretic and we'll sue them for fraud. That's what happened in this case.

But, ladies and gentlemen, when you get to Question Number 4 on the verdict form and you have to deal with this question of fraud, you will, I think, understand what this case is really about. It's about whether or not it is reasonable, given the state of medical science, for different people at different

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times in history to hold different opinions about the relationship between smoking on the one hand and health on the other.

And once you hear the law from the Judge, you will realize, ladies and gentlemen, that a difference of opinion can never be fraud.

Now, if there's one word that you probably heard more -- you know, we can -- on these computers, you can actually go look words up and find out how many times. I didn't do this, but I would suggest to you that the one word you probably heard more than any other word in this case was the word "cause." Cause.

And you probably all thought you knew what that meant when you came in here last October. And you probably didn't know that there were so many different ways to talk and think about that word, as you now know.

Now, from these defendants, you've heard that we believe that there is a scientific -- an accepted scientific definition of that word that's been used in science for years. And we've suggested to you that it requires three types of evidence: It requires epidemiology, which is statistics;

It requires an animal model, where you expose an animal to the same substance, the same way that

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humans get it. If it's breathing, you have them breathe it and you obtain the disease;

And then there's what we call the mechanism or the "how" and the "what." In order to say a disease is caused by something, science needs to understand.

And so, we have said throughout the case that in order to reach the conclusion about cause, you need to have those three kinds of evidence. The plaintiffs, on the other hand, claim that one kind is enough; that if you have epidemiology, you can stop thinking about the problem; you can say cause, epidemiology only.

And the suggestion, frankly, was made that we made this up; that these three lines of evidence, that we made these up.

And I want you to remember, we brought Dr. Thomas, Dr. Richard Thomas -- I brought his picture so you can see and remember what he looks like. He may not be happy with that picture, but we hope you remember.

And Dr. Thomas, you'll remember, was as qualified as anybody you heard from. There's a lot of talk about board certification. You remember that? Five different boards was he certified by, including pathology and toxicology.

Dr. Thomas teaches at medical schools, such

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as Johns Hopkins; Howard University in Washington, D.C.; the University of Maryland; George Washington University. He teaches at the Armed Services facilities. He teaches courses run by the United Nations, the World Health Organization, the National Institute of Health.

But the thing perhaps to say that he's done in his life that has the most bearing on what we talked about here was his 12 years working for the National Academy of Sciences, and you heard about that group not just from him, but from a lot of other witnesses as we go through witnesses, because everyone would agree that that is the premier scientific organization in the country. It's where the United States government goes when they have disputes between, you know, the Environmental Protection Agency and the Interior Department, would be in dispute about water or something. That's where they would go. And that's what Dr. Thomas ran as a director for a number of years.

And Dr. Thomas told you about the Koch postulate, and how this was the accepted definition of cause that had been used by science for years.

It's not something that was made up. Because you just don't have to rely on what a tobacco company

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told you, my client told you, or what Dr. Thomas told you. Even the Surgeon General of the United States in 1964, ladies and gentlemen, made it very clear that judgments of causation, he's talking about, require -- all three lines of evidence are essential.

We didn't make that up. In 1964, the Surgeon General said you've got to have the three lines of evidence. He also said that cause is a matter of judgment.

You remember later in the same document, he started by saying statistical methods cannot establish proof of an association. That's first.

He said that the committee didn't use the word "cause" in an absolute sense.

And, finally, he said it was a matter of judgment.

And that's what the Surgeon General of the United States said.

And you know, you just don't have to rely on the Surgeon General of the United States either, because you heard some other witness who came into this case, witnesses brought by Mr. Rosenblatt and the plaintiffs.

He mentioned to you yesterday Dr. Grossman. He was the cardiologist who came, and he had to be --

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we had to take a video deposition the day before because of the schedule.

And you'll remember that this was an exhibit from that -- from his deposition. And he agreed that these are the three lines of evidence that science uses to determine scientific causation.

And you remember Dr. Goodwin. Dr. Goodwin was from over here at the Sylvester Cancer Center. And Dr. Goodwin, I asked him the same question. And he was here live before you:

In the course of your work, it's fair to say you focused on all of these areas, trying to reach a scientific conclusion about cause?

Correct.

So Dr. Grossman and Dr. Goodwin both accept the view that there are three lines of evidence, that the Surgeon General accepted, that Dr. Thomas told you about, and that the defendants in this case have suggested to you throughout.

Ladies and gentlemen, I believe you will find that it is reasonable to suggest that three lines of evidence are needed if you're talking about scientific cause. So I want to talk about these three lines of evidence, because you're going to have to decide if this is a reasonable position.

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So we need to look at each of these lines of evidence and see how the evidence has been about smoking.

Now, the first is epidemiology. And you now know that that is really a statistical analysis. And you know that in 1950, there were five epidemiological studies that came out that in some ways associated smoking with lung cancer.

But the interesting thing is, ladies and gentlemen, and the reason you can't just stop with epidemiology, is that even the people -- some of the same scientists who did those studies question whether those studies were enough to prove causation.

Dr. Schreck, he did one of the studies. And you'll notice that he said: For every expert who blames tobacco, there's another who says it's not the cause.

And he even said -- and he did one of the five studies -- a statistical study cannot prove. And that's all we're saying, ladies and gentlemen, is that statistics alone is not enough.

Dr. Levin, now, you heard his name several times throughout this case. He did one of those original five studies. And Dr. Levin had the same idea.

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And he said, even though you had the studies, there's a reason for -- it's a subject for further inquiry, and he hoped that the federal government would follow up on this.

And now you know that statistics can oftentimes lead to the wrong conclusion. Remember you heard testimony and it was mentioned to you a couple of days ago about AIDS. If we had stopped -- if science had stopped with epidemiology with AIDS, science may still think that AIDS is caused by those recreational drugs that the first epidemiological studies suggested.

And you heard yesterday about cirrhosis of the liver and how -- try to make some connection between cirrhosis and drinking and smoking. You know, the interesting thing about that is that proved the point. Because for cirrhosis of the liver, you have animal models and there's an understanding of mechanism. Completely different situation from smoking and lung cancer.

And you also heard about peptic ulcers. We all grew up thinking that people who were stressed had ulcers. But now we know and the Surgeon General in 1979 talked about exactly this problem. It says, this doesn't prove a definite answer to the question: Is smoking a cause or is it associated?

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So the Surgeon General in 1979, with regard to smoking and ulcers, was talking about the difference between associations on the one hand and cause on the other. This is not something, ladies and gentlemen, that we dreamed up.

And we only point these examples out to say that you shouldn't stop with epidemiology, and it's not fraud to suggest that.

Now, the next line of evidence is animal models. And I think you heard testimony about this a lot. And you understand the importance of animal models.

The importance is that if you can recreate the disease with the same substance in the same way in an animal, you can learn a lot about the cause of the disease and how to cure it or prevent it.

And you've heard testimony that there's been -- there have been a lot of attempts over time to induce lung cancer with animals. And no one has been successful in developing lung cancer in animals breathing cigarette smoke.

In 1964, the Surgeon General said that the production of bronchogenic carcinoma has not been reported by any investigator in animals and cigarettes.

And then again in 1967, the Surgeon General

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spoke about it again: The search continues for an experimental animal system in which the inhalation of smoke will produce malignant tissues.

And then in '82, the Surgeon General spoke about it again: Attempts to induce significant numbers of bronchogenic carcinoma, negative.

And then during Dr. Thomas' testimony you heard from a Dr. Cross. And this was in 1989: The general evidence in animal smoke exposure is that it is virtually impossible -- and you also may remember, ladies and gentlemen, that Dr. Thomas was hired by the United States government to try to induce tumors, lung tumors, in beagle dogs. He did that study, and he was unable to do it.

And he did this -- and he was hired by the federal government to do this long before he started reviewing anything for this case, before he even knew anything about the tobacco work that he has done in reviewing that literature.

And you know, this is significant, because you can get tumors in some animals with other substances. For instance, diesel fumes; breathing diesel fumes in animals, you can get tumors. Asbestos, tumors develop.

If cigarette smoking was the cause -- without

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any explanation -- then you would be able to get lung cancer in animals breathing cigarette smoke. You don't. And, frankly, no one knows why. And it can't be fraud to say that.

And the third is the lack of mechanism.

It's important to understand how a disease forms, what causes it in the initiation stage, and what causes it to continue. And you learned about something here that scientists call the black box theory of causation.

And we had a board that Dr. Thomas had, and the idea is that you have a whole population of folks and they're exposed to all of the different things we're exposed to: air pollution, smoking, cars, environment, industrial chemicals and all that. And we know some people over here get lung cancer. And we don't know what happens here that causes that. And that's never been disputed.

And you know, it's interesting. You know who came up with that, who coined the phrase in an article? Dr. Samet. Do you remember Dr. Samet, one of the plaintiffs' experts in this case?

And no expert who came in for the plaintiffs was able to explain to you why cancer develops in only ten percent -- lung cancer in only ten percent of the

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people who smoke. Three-, four-pack-a-day smokers, ten percent.

You know, yesterday or the day before, I forget which, there was a lot of ridiculing that went on, and I'm going to talk about some of it. But one of the ridiculing that went on was of Dr. DerHagopian. And it was almost a suggestion that he was saying something that was a joke, when he said there's an unknown factor that precipitates lung cancer that we don't understand.

And, remember, counsel ridiculed him. Well, ladies and gentlemen, all he was doing was saying exactly the same thing that Dr. Samet was saying: Something is happening in there that we don't understand. It's not some mysterious space invader. It's true scientific fact.

There is a consensus in the scientific community that the mechanism of cancer is unknown. You heard that from Dr. Staples. Remember the tall doctor that Mr. Rosenblatt brought in? And he spoke of it about lung cancer.

He also talked about it with regard to cardiac problems. He said that science doesn't know why plaque develops in the arteries.

That was Dr. Staples that agreed -- agreed

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with Dr. DerHagopian about. They didn't ridicule Dr. Staples.

Dr. Carr, another of their witnesses, said the same thing: There are pieces of the puzzle missing regarding cigarette smoking and lung cancer. They didn't ridicule him. They ridiculed Dr. DerHagopian for saying the same thing.

And you heard about all of the complicated molecular and genetic research that's going on, as we sit here. I didn't put it on the TV, but you remember the board that Dr. Thomas worked with the genes and the DNA and showed how you can change DNA and so forth.

And Dr. Thomas told you about colon cancer, because that's one that we actually do understand. Science has broken through in that area. And Dr. Thomas told you that the reason we're doing this research about lung cancer is so that you'll be able to have a chart like this about lung cancer some day.

Yesterday, even Mr. Rosenblatt yesterday, and I wrote this down, Mr. Rosenblatt said: Medical science doesn't know why a cell deteriorates. That's -- that's a fact. And that's the reason mechanism is important. Science does not know the answer. And, ladies and gentlemen, it cannot be fraud to say that.

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Now, you keep seeing a lot of documents where the word "cause" appeared, and you heard a lot of witnesses who came in, and in their direct examination would say "cause." And I think you -- it's a fair question for you to ask: How can all these people use that five-letter word if we don't have this evidence, if we don't have this science?

It's a fair question.

And you now know the answer, ladies and gentlemen. The answer lies in the fact that sometimes the public health community gets ahead of where the science actually is, because they believe it's more prudent to say "cause" before all of the science has developed that conclusion.

And there's a suggestion by counsel yesterday or the day before that we made this up, too; that this is just some figment of the tobacco company mind that the public health community looks at things differently. Well, now you know from the 1964 Surgeon General's Report that this isn't something that was made up.

They're talking about coronary disease. 1964. And they say: Although the causative role of cigarettes from coronary disease is not proven -- in other words, there's no scientific proof -- the

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committee considers it more prudent from the public health viewpoint -- more prudent from the public health viewpoint -- to assume that the established association has causative meaning, rather than to suspend judgment.

So they decided: We don't have the scientific proof yet, but we think from the public health viewpoint it's prudent to say "cause" instead of not saying "cause." Didn't we make this up.

The goal of the public health community, the Surgeon Generals, the American Cancer Society, the Heart Associations, the universities is to warn people about dangers and risks to their health. And the best way to warn people is to give them a simple message: Stay out of the sun; it causes cancer. Don't smoke; it causes cancer.

The public health community has made a judgment in this case, based on very strong epidemiological data -- and please, don't misunderstand, and we said this with a lot of witnesses. Nobody -- nobody disputes the epidemiology for some of these diseases, nobody disputes, but the public health community, because it's more prudent, has decided to say -- use that word "cause."

And, frankly, you would expect that; I would expect that from the public health community, to be

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more cautious, to be more conservative.

Dr. Grossman, again the cardiologist that was here, he said the same thing. I asked the question: It doesn't surprise you that the American Heart Association would be taking the position -- we're talking about heart disease with him -- before all of the scientific research had been completed?

Yes, it wouldn't surprise me. That's correct.

So Dr. Grossman agreed that that's what the Public Health Service does. We didn't make this up, ladies and gentlemen.

And we don't disagree with it. We don't disagree that the public health official; it's their job to send messages before the science is complete.

Dr. McAllister told me that. He said he'd never quarreled with the studies and the recommendations based on their interpretation of the public health action definition of "cause."

And Dr. Carchman from Philip Morris told you the same thing. He said: If you equate causation with increased risk, the way a lot of people do, the public health community, then it does. And from a public health perspective, it's probably the right thing -- the right thing to do.

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So, let's be clear about this. Nobody on that side of the room believes that it's inappropriate for the public health community to take the position that they take, based on the evidence they choose to base it on.

But, ladies and gentlemen, to turn that around, it is not unreasonable for scientists to say: Let's don't stop with epidemiology; let's keep going, because epidemiology alone, as the Surgeon General said, doesn't prove causation.

Because if you stop there, you'd be changing the results for one product: tobacco. You'd be saying, for every other product, every other substance that science will investigate, we're going to require the typical, normal scientific approach to research, but for tobacco, because smoking is not politically popular, we're going to say: Different set of rules. You have epidemiology; that's enough.

And Dr. DerHagopian told you why you shouldn't do that. Dr. DerHagopian said he was here because he feared that if you say "cause," you end the discussion; that you'll never learn the "how," the "what." You'll never know the cause -- the true cause, so that you can find a cure. This isn't -- this isn't just some theoretical exercise, ladies and gentlemen.

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You need to know this for a cure. You need to know it for prevention.

And remember Dr. DerHagopian, a local doctor, practicing in the community. It's not popular for doctors to come down and testify in a trial on behalf of the tobacco company. Dr. DerHagopian did it. He dislikes smoking. You heard that even from Mr. Rosenblatt. He tells his patients: You'd be nuts to smoke because of the risks associated.

But he came here to tell you that because it hasn't been scientifically proven and it would make his job easier if you understood the cause, and you could prevent and you could cure. That's why he was here.

And Mr. Rosenblatt, after he finished ridiculing him about his views, which mirrored views you've heard before, he said: Well, you can't believe anything he says because his specialty is in breast cancer.

Well, ladies and gentlemen, fortunately, you heard all of his testimony, and you heard about his working at hospitals and teaching and being on cancer boards of hospitals. And you heard that he has become more specialized in recent years in breast cancer, but you heard about all of the other cancers and all of the other patients he's treated throughout his entire

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career.

And Mr. Rosenblatt suggests that the defendants didn't bring you any doctors who treat people, who treat real people who are sick. Well, you heard from Dr. Oparil, who treats people. She was the one who was the head of the Heart Association at one time.

You heard from Dr. Cockburn from Tampa. You heard from Dr. Glenn and Dr. Gilmore and Dr. Hensley and Dr. Cloninger and Dr. Hammer. These are real doctors who treat real people, and it's insulting to suggest that you shouldn't believe them because of a false statement, really, a misinterpretation. They treat people.

And more importantly, they were willing to come in, notwithstanding the unpopularity of the substance they were talking about.

So plaintiffs want you to believe that this relationship, as I said in the beginning, this relationship between smoking and health has been decided, has been completely -- no more questions about it since 1950.

Ladies and gentlemen, you now have had the benefit -- Mr. Rosenblatt said that a lot over those two days, about how you're the only jury that's had all

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of the benefit and things like that. Well, that's absolutely true in this respect: You've had the benefit.

And you remember Dr. Thomas came in here, and Dr. Thomas testified, and Dr. Thomas told you that he had reviewed thousands -- maybe tens of thousands, but thousands of pieces of medical and scientific literature that was generated over the last 50 years; and after he reviewed these, he presented evidence to you of what the scientific community was saying.

No one else did that in this trial. No one else came in and showed you what the scientific community. You just heard from people who were willing to come in and say: Does smoking cause cancer?

Yes.

Thank you. No more questions.

But Dr. Thomas reviewed this. And he showed you quotes from a lot of those articles. And I want you to remember, he didn't look for obscure people out on the fringe of the scientific community. He brought you quotes from articles by people who were the leading scientists in the nation, and maybe the world, during that time.

These were people who were in the mainstream. These were important medical centers where these people

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worked, important universities, public health organizations. He brought these in.

And you know what's interesting? In all of the two days, you didn't hear any complaint or any criticism or any questioning of the substance of Dr. Thomas' testimony. You heard how much money he was paid for the work that he did. And that's all you heard.

And we made a chart, if you'll remember -- and if I could squeeze by you, ma'am, for a second. We're running out of space to put things.

We made a chart during his testimony. I'm going to put it up over here. Can everybody see that? Can you all see? Okay. Because I want to refer to that a little bit.

We made that chart that Dr. Thomas testified to. And we put it in time frame so you could have an understanding visually of what was happening at various times, because I'm going to talk about some of those things up there in a minute as far as time goes.

And these are all in evidence, ladies and gentlemen. So when you go back into the jury room -- I'm not going to read off all these numbers, but these were copies of the actual boards, and we'll look at a few today as well.

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These are copies of the actual quotes, and you can see who these people were, the Surgeon Generals and Wynder and Doll and Levin, Churchill. Some textbooks were in here. You can see all of these, and you can read these. And you can make your own judgment about whether or not people were having a debate during this time.

You heard about Professor Doll from England and Professor Peto. This is what they said: 30 years of laboratory research has yet to identify reliably the important carcinogenic factors in cigarette smoking.

That was in 1985.

And then there was Dr. Weinhouse, 1986: Despite a half century of intensive research, cancer still remains an enigma. And it talks about the secret of its initiation and maintenance.

So, ladies and gentlemen, Dr. Thomas presented evidence to you that really stands unrefuted, uncontradicted; that important members of the scientific community were carrying on a debate about the relationship between smoking and health in all of the periods that we talked about here.

Now, Lacy Ford was mentioned this morning. And you recall that Dr. Ford was the historian who presented evidence to you, and you'll hear about some

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of that tomorrow; that there is a long-standing, widely held view among ordinary people in this country that smoking causes disease, smoking is risky. You remember that testimony.

Well, the problem here is, the plaintiffs are suggesting to you that you go a step further. They're suggesting that the scientific community all bought in and agreed to this all during the time period; that they all believed back into the '40s and '50s that this issue was decided; and that there was no reason to do anything more.

Dr. Thomas brought you the evidence, ladies and gentlemen, that that wasn't accurate.

The bottom line is that this issue of cause -- this issue of cause that we've spent so much time in this case talking about is a lot more complicated than the plaintiffs want you to believe.

You heard about Dr. Steinfeld, and he had an interesting expression. He said, if you remember: For every complex problem, there is a simple answer, and it's always wrong.

Do you remember when he said that? That's what the plaintiffs -- no matter how loud they say it, no matter how many times they use the word "cause," without any further explanation, no matter how many

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witnesses they bring in, who answer yes during their direct exam to the question of, "Does something cause?" the facts remain that 90 percent of people who smoke never get lung cancer. That's not disputed.

The day before yesterday, counsel suggested that it was misleading for the tobacco industry to say that, but, ladies and gentlemen, that's a scientific fact. That's what scientists are trying to figure out. That's the mystery.

A scientific fact that people who don't smoke -- not a large number, for sure, but people who don't smoke get lung cancer. It's a scientific fact that when animals inhale cigarette smoke, they don't get tumors in the lung; whereas, they do with other substances.

Even Dr. Davis, the Dade County Medical Examiner that you heard from, the former, told you that at time of autopsy, you can't even tell what caused the cancer. You don't know whether it's genetics or smoking or radon or asbestos or some unknown reason.

It's a scientific fact that there's no mechanism and you don't know -- and there's no animal model. It's a scientific fact that we know that in Japan, people smoke a lot more than they do in the United States, but at the same time we know that the

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lung cancer rates in Japan are substantially below the ones in the United States.

The position of the defendants, ladies and gentlemen, in this case is very clear. The defendants believe that the search for the answers to these questions ought to continue, and believing that and saying that can never be fraud.

Now, I've been talking with you about this debate, about the good faith debate that was going on, and I want to turn to a new subject now.

On this verdict form, there are going to be some specific questions about disease for you to answer. And you saw them yesterday, that long list.

And here we have the same dichotomy. The plaintiffs suggest that it's a simple exercise; that just go down the list and check them all yes.

I think you now understand that causation of disease is never a simple question. And so when you look at those diseases when you're back in the jury room, and it's question one, I would ask you to think back over the evidence that you heard.

Let me give you an example. You heard a lot of testimony about coronary heart disease in this case. And that's one of the diseases. There are several different formations of it. You'll see. But that's

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one of the ones that plaintiffs say you just should not ask any questions about and you should say yes; yes, it causes. And that's some things that you heard about, atherosclerosis, diseases such as that.

They told you smoking causes heart disease; the answer is yes; that's the end of it; no explanation; don't think about it; don't discuss how or why. Just answer it yes.

Well, remember Dr. Thomas showed you a medical text that's being used in medical school in 1992. 1992, ladies and gentlemen. And it starts by talking about cardiovascular disease and it talks about some other cancers, whose etiology -- that means cause; that means what causes it to start -- are unknown. Studies of population -- epidemiology -- have made possible the identification of agents or factors which may be suggested as contributors.

Risk factors; you heard a lot of about that. It must be noted that these are only patterns of association and cannot be considered causative agents, since not all people with these factors will go on to develop the disease.

That's when it was read at the trial. That's the textbook it comes from.

Plaintiffs say, yes, just say cause; don't

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look beyond.

Remember Dr. Staples, the tall man, again from the University of Florida, told you that heart disease is found in smokers and in nonsmokers, and the process is identical in both. So you can't look at the arteries of the heart and say: This one was a smoker or that one wasn't a smoker.

Remember Dr. Gilmore, the dean of the Miami Heart {} doctors. He listed a lot of diseases -- a lot of heart diseases on the board, you remember, and he told you that the bulk of those, nobody associates with smoking. Nobody does.

And he talked about 20 or more risk factors, and you heard testimony that doctors believe there may be as many as 200 risk factors for heart disease. And plaintiffs' witnesses, Dr. Davis and Dr. Grossman and Dr. Staples and Dr. Samet and Dr. Whelan, they all testified, if you go back and think through their testimony, they all talk about different risk factors, other than smoking, which were associated with heart disease.

It's not a simple proposition. And that's all I'm saying, ladies and gentlemen. I'm saying that causation is more complicated than the plaintiffs would have you believe.

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Dr. Staples said specifically that when you have multiple risk factors, it is impossible to determine which of those factors cause heart disease.

And remember we had an article from Dr. Braunwald, a textbook, and he said: Fully half of all patients with the condition do not have any of the established coronary risk factors. And then he lists some. Half. Half we don't know.

Dr. DerHagopian was ridiculed for saying that there's a cause for some diseases that we don't understand.

Dr. Braunwald, it came out of Dr. Samet's testimony, said that's exactly the fact.

And Dr. Staples and Dr. Samet both agreed to that; that there are unknown causes.

The same is true for stroke and peripheral vascular disease that you'll see. The evidence frankly is inadequate, and you'll have to look at it.

All I'm saying to you is be reasonable.

Now, when you go down that list, we talked about heart disease, but the same thing would apply to many of these other diseases.

I would ask you, when you go down that list, think back on the evidence that you've heard about the various diseases. Remember the Surgeon General, that

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very first board that we looked at, said smoking -- causation, rather, is a matter of judgment. And when you get into the jury room, you will get an opportunity to exercise that judgment.

Now, don't be confused. Yesterday Mr. Rosenblatt, or maybe the day before, told you that our position was that you had to know 100 percent in order to find cause, and that that was a ridiculous burden and that it wasn't law.

Well, the problem here is, and you'll understand this completely when the Judge gives you all of the instructions, there's a difference between legal proof, which is what the Court will tell you, and scientific proof. They're not the same thing, ladies and gentlemen.

What --

MR. ROSENBLATT: Objection, Your Honor. That's not a correct exposition of the law.

MR. REID: Are we going to argue this?

THE COURT: Yes.

MR. REID: Speaking objection, Your Honor, or --

THE COURT: Well, he hasn't spoken yet.

Let's go sidebar.

MR. REID: I'm ready to move on to something

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else.

MR. ROSENBLATT: Okay.

MR. REID: I'm not --

MR. ROSENBLATT: Move on.

MR. REID: I'll be glad to.

What we have said, ladies and gentlemen, is that for cause, science requires three types of evidence. And at the conclusion, you have to decide if that's the proper standard and it's been proven.

I would ask you to look at the entire array of the proof that you have and see if there's persuasive evidence about cause for each of the diseases.

As yesterday, when they had the list out there, Mr. Rosenblatt went down the list and said: Yes, just check yes on all of these; don't think about it; don't remember the testimony. Just remember that somebody said smoking causes everything, and answer yes.

This ought to -- this ought to cause you to pause a little bit. This ought to cause you to pause a little bit and to recollect about the evidence, which is what this quick down-the-list would keep you from doing.

And I just want to mention a few of these, to

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give you some examples. It's your judgment, and you're going to make that decision. But I'm just going to give you some examples.

Mr. Rosenblatt brought in three or four what I'll call all-purpose witnesses. These were witnesses whose specialty was in one area, but who were perfectly willing to testify about diseases all-out, outside of their area.

And these people would come in and say: Smoking causes blank, and then they'd fill it in. Smoking causes, and then list maybe eight diseases, without any consideration of whether these were diseases that the doctor even dealt with.

For instance, they brought you a group of pulmonologists, and when you go back and look at all that testimony, you'll find those are the witnesses -- the pulmonologist, the doctor that said smoke causes bladder cancer and kidney cancer and cervical cancer and pancreatic cancer, and yet they all admitted they didn't treat any of those conditions.

Now, the other side of that evidence is you heard from specialists in the area. Let's take bladder cancer. You heard from Dr. Cockburn who came over from Tampa, and once again, the suggestion was made that you didn't hear from qualified doctors, from the defense,

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that there were no doctors who were willing to come in.

Well, Dr. Cockburn, you remember, was a urological oncology fellow at Sloan-Kettering. He was the director of urology at Harlem Hospital while he was assistant professor at Columbia University Medical School. He's been treating real patients and treating at the same time in Tampa for years.

And he told you as to bladder cancer, that it had not been shown to be caused by smoking.

Dr. Hensley, do you remember his credentials? He was board certified in anatomic pathology. Between 1962 and '95, he taught at the University of Wisconsin and University of Miami Medical School.

He's done research funded by the National Institutes of Health, the American Cancer Society, the Veterans Administration. He has published articles and peer-reviewed. He's diagnosed thousands of cancers, and he said he personally had done about 10,000 autopsies. He done a lot of them out here at Jackson Memorial Hospital. He told you that smoking wasn't even a risk factor for pancreatic cancer.

And Dr. Burns, one of plaintiffs' other witnesses, told you there was no consensus about cervical cancer and smoking.

So then plaintiffs put some more on the list:

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aortic aneurism, miscarriage and infertility, but they really offered essentially no evidence about those diseases.

Dr. Gilmore told you that aortic aneurism was not even a risk factor. And remember, he's a doctor who practices cardiology here in Dade County. He had done a fellowship at the National Institutes of Health. And he was board certified in internal medicine, and he had been a full-time professor for 13 years at the University of Miami. And he had treated between 8 and 10,000 patients.

And then they put miscarriage on the list. But you didn't hear from any OB/GYN. And they put infertility on the list, and the only evidence you heard was from a nonmedical doctor, Elizabeth Whelan, and she just said there was a reduction in estrogen levels, a far cry from evidence of -- for proof in a court of law. And she mentioned low birth weight babies, and that's not even on the list.

The same with stomach cancer. Dr. Burns and Dr. Samet told you that they couldn't say there was a link.

And then there's lung cancer. Now, lung cancer, as I told you before, there's no dispute about lung cancer. Some lung cancers are highly associated,

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based on the epidemiology. But you're going to see a lot of different types of lung cancer on the verdict form, and you're going to have to remember the evidence.

And let me just give you an example of the complexity of this. There's something called bronchoalveolar cancer. That's BAC. Now, this is the evidence from Mr. Rosenblatt's witnesses.

Dr. Carr and Dr. Cahan said no causation there. Dr. Petty said there's disagreement in the medical literature. Dr. Staples said that more nonsmokers get it than smokers, and Dr. Hensley's testimony was essentially unchallenged when he said it wasn't even a risk factor for that kind of lung cancer.

This makes it clear, if you just looked at that evidence alone, that the answer would have to be no for BAC, for instance.

I'm just saying, ladies and gentlemen, that you should not adopt the simplistic view of causation. You should take the time to remember the evidence, and as you do, you'll see -- you'll see that there's a real difference in evidence for a lot of these diseases. And you'll be -- and I think you'll realize at that point that what we've suggested to you, that you need scientific proof -- you just can't say "cause" and drop

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it at that, drop it at epidemiology -- you need scientific proof -- but you conclude causation. And I think you'll find that that's not only reasonable but it's truthful. And that's what I would ask you to do when you look through those diseases.

This would be a good break if we're going to have an afternoon break, Your Honor.

THE COURT: All right. Okay, we'll take our afternoon break at this point, folks. Again, the same rules apply.

(The jury exited the courtroom.)

THE COURT: Court still in session, folks.

(A brief recess was taken from 3:00 to 3:15 p.m.)

MR. ROSENBLATT: One sidebar comment.

(The following proceedings were had at sidebar:)

MR. ROSENBLATT: On a serious note, I have not objected. My understanding of final argument is you're not supposed to comment about the opposing lawyer, and on several occasions Mr. Reid has said, "Mr. Rosenblatt ridiculed this witness or that witness."

I don't think -- you know, I don't think that's a proper thing to do. I don't want to be in a

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position -- and I didn't. I haven't, you know, objected. We're at a break.

And if the Court agrees with me, then, you know, I don't think it's necessary to Mr. Reid's argument, but obviously it's proper to say Mr. Rosenblatt said such -- made such and such a point. That's valid, but you're insulting me in what you say, I ridiculed something, and that's your interpretation of what I did. I did not do -- I insulted witnesses and I insulted -- but I did not insult counsel at any time during the two days.

My understanding is that's a very clear no-no in the Third District, to say negative things about opposing counsel.

THE COURT: I disagree with your interpretation of what occurred, basically. They were just describing some of the things you said in terms of how you said it, so I didn't take it in that light.

It would be different if they ridiculed the individual, but I think under the circumstances, when you raised the argument in the manner that you did, that could be looked at as ridiculing the argument, you ridiculing someone's argument, and that's fair comment for them.

MR. ROSENBLATT: Okay.

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THE COURT: I don't have any problem with that, so I don't agree with you. Overruled.

MR. ROSENBLATT: Okay.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

THE COURT: Everybody set?

All right. Let's bring the jury out, please.

THE BAILIFF: Bringing in the jury. Jurors entering the courtroom.

(The jury entered the courtroom.)

THE COURT: All right. The jury is present and accounted for.

You may be seated. Thank you.

You may resume, sir.

MR. REID: Thank you. I told you I was going to change subjects for a little bit now.

In this case, ladies and gentlemen, I think it's a fair conclusion from all of the evidence that there was a serious and ongoing debate throughout these years, and there's a difference of opinion. Plaintiffs suggest there wasn't; that it had all been decided.

But you can't get around -- I wanted to put this back up because I'm going to make reference to it in a minute. You can't get around all of the information that's represented in this chart.

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So I'd like to talk with you a little bit now about what the plaintiffs have done to try to get around what is irrefutable evidence that there was a debate, and I think the plaintiffs have done this by overstating some things and by misstating some things, and I want to talk about a couple of examples.

The first thing I want to talk to you about is a number, a number that you've heard a lot in this case, 400,000. Do you remember that number? You heard it several times on Monday and Tuesday.

You heard it in opening statement, that smoking kills , people. You heard one of plaintiffs' experts come in and try to relate that to the number of jumbo jets crashing every day.

You heard witness after witness, during the plaintiffs' case, talk about that number. You heard counsel repeat the number in questions to witness after witness in the defense case.

In fact, I told you, you could go through on this computer and count things up. I did it for that word, for that phrase -- and it's not always exactly 400; sometimes it's 420 -- but I think it was nearly 40 times that you heard that in this case.

And yet not a single one of those people who said that number to you ever told you that that was

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merely an estimate; it was an estimate based on a formula. None of those witnesses went out and calculated and came in and told you: I calculated, and it's 400,000.

That calculation was done one time back in 1979, and it was just repeated and parroted by each of those witnesses and lawyers who have said it ever since.

It was done, ladies and gentlemen, I would submit, to mislead you, to cause you to render a verdict based on passion and prejudice; and the Judge is going to tell you, you can't do that.

Think back over the people that used that number. Did any one of those people ever go back and look at the data that was used to calculate that number? Did any one of them show you the formula that was used? Did any one of them tell you that Dr. Levin, who we talked about in another context, the inventor of the formula, says you shouldn't use it in a situation where people are different? Did any of them tell you that even the Surgeon General pointed out the shortcoming of that calculation?

Nobody did. They just kept saying over and over again, 40 times, 400,000 people killed from smoking. They want you to believe that someone went

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out and counted death certificates. That's what they want you to believe. And it ought to be clear why they kept saying that.

Now, we brought Dr. Wecker to you. And you remember him. He was a professor of statistics at the University of Chicago and then the University of California Davis. He's a private consulting mathematician. He's a Ph.D.

He's the only witness who came in to talk to you about that number. And that was the reason he came, ladies and gentlemen. He came because it wasn't fair to keep saying that number over and over, to try to get you riled up, without knowing the facts. And that's why -- that's the only reason he came. And I'm sorry we had to take that half-day to deal with that, but you needed to know the truth about that number.

He told you that it was derived from the American Cancer Society -- do you remember CPS, Cancer Prevention Survey II? And he's the only witness who came in here that had actually taken that data and put it on his own computer and analyzed it.

And he told you, ladies and gentlemen, after his analysis, that that number was inaccurate and it was unreliable, because it ignored all factors except smoking.

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And remember, he did the same calculation for you. He took 1990 as an example. And in that year, remember, there were 1.1 million actual deaths in 1990. And he took the exact calculation used by the CDC, that the Surgeon General then picked up, and that all these witnesses parroted back to you, he took the same formula and he took lack of exercise and he did the same risk calculation, and he came up with the number of deaths associated with lack of exercise.

And remember, that was 587,000. And then he did the same thing. Same year; same population of people. He did it for people who had an unhealthy diet. And he found 758,000 people that you could say attributable deaths to unhealthy diet.

And then he did it for two or three other risk factors. And by the end, ladies and gentlemen, he had twice as many, quote, "attributable deaths," and that's what that 400,000 number is. He had twice as many -- more than twice as many as actual deaths.

He wasn't the only one, though, that you heard criticism. Remember, while he was testifying, you heard of the writings of a professor of statistics at Georgetown Law School, and you heard from a 37-year veteran of the National Institute of Health.

And this is what the professor said and the

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public health -- former public health employee: If a smoker who is obese has a family history of high cholesterol, diabetes, heart problem, never exercises, dies of a heart attack, the government attributes the death to smoking alone.

If applied the other factors identified by the study, it would produce more than twice as many attributed deaths as there are actual deaths. And that's what Dr. Wecker showed you by calculations.

And that there's more to this.

To be blunt, there is no credible evidence that 400,000 deaths per year, or any number remotely close to 400,000, are caused by tobacco.

I'm just suggesting to you, ladies and gentlemen, that that number was said over and over to make you mad, without any basis in fact. That's what I'm saying to you. And now you know the story.

And if you'll remember, Dr. Wecker, his entire cross examination the rest of that day, had absolutely nothing to do with his substantive opinions. It had to do with other cases he had worked on and other substances and all that. Remember all that discussion? Nothing about this. Nobody has come in here, except Dr. Wecker, and talked about that number.

Now, there's another attempt to mislead you,

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and you heard a little bit about it this morning from Mr. Heim, but I want to talk about it some more.

In opening statement, you were told that it's the position of the defendants that smoking does not cause lung cancer. And you were told that TI was going to issue -- you'd see press releases saying: Smoking doesn't cause lung cancer.

Once again, ladies and gentlemen, they told you that was our position to upset you, to make you mad, to try to get you to award punitive damages, because that's not our position. That's not the evidence. You didn't hear a single defense witness get on the stand and say: Smoking doesn't cause lung cancer.

As we've said over and over, and this goes all of the way back to the beginning of what I was talking about today, smoking is a disease too complex to reduce to a sound bite, and that's what plaintiffs are urging you to do.

And they talk about a party line. Now, these are different companies and you've heard testimony from employees of all these companies. But just because one person looks at the data and says: This is what I believe, and a second person looks at same and says: I believe the same thing, is that a company line? Is

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that a party line because they both draw the same conclusions and they both have the same belief? That doesn't make it a conspiracy.

Remember, all of the witnesses that the plaintiffs put on, one after another after another, who came in and raised their hand and said smoking causes whatever, is that a party line? Is that a party line?

These companies do, however, believe that smoking is a risk factor and that smoking may cause a number of diseases. And there's no dispute about that. You heard the testimony by videotape, the CEO of Reynolds, the current CEO of Reynolds Tobacco. And he told you what his view was.

By the way, this -- I want you to recall there were 11 CEOs that you heard from in this case, and at the time the CEO was deposed of each of these companies, that was the current, acting CEO. So don't be misled that somehow the defendants were trying to hide their current CEOs.

The plaintiffs said: I want to depose your current CEO, and that's the person they got to go up and take the deposition. And the Judge told you the depositions are the same as being here. They're sworn to tell the truth.

And you saw the videotape of Mr. Schindler.

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And he said, concluding: I've used cigarette smoking as a risk factor that may cause these diseases.

That's our position, not the position that plaintiffs want you to think we take, that it doesn't cause any disease.

You also heard from Mr. Morgan, who was CEO of Philip Morris at the same time. Mr. Morgan said -- you can read the whole thing -- he said a more accurate characterization of his position -- a fair characterization is that smoking cigarettes may cause lung cancer.

Now, the plaintiffs don't have to -- don't have to agree, but, ladies and gentlemen, this is the belief, and a sincerely held belief cannot be fraud, cannot be fraud.

It's interesting on the one hand, plaintiffs oversimplify and say: Smoking causes X, and that's the end of it. They say: You can't say risk factor.

And it's interesting the double standard they apply. On the one hand, when their expert witnesses come in and say -- use the word "risk factor," the term "risk factor," it's okay. But when a defense witness comes in and says "risk factor," they say it's a fraudulent lie.

Dr. Whelan is a perfect example of this. She

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testified, under oath in this case, that when you talk about causation for chronic diseases, you're really talking about increased risk. She said that at 28797 in the transcript.

She said that the technically correct term is risk factor, not cause. This isn't the tobacco company witness; this is Dr. Whelan. She said that using cause relating to cancer is technically imprecise and inaccurate.

And, ladies and gentlemen, perhaps the greatest example of this double standard, where it's okay for plaintiff to say "risk factor" but if defendants say it, it's not, Dr. Whelan says that if the New York Times calls me and asks me if smoking was a cause of cervical cancer, I would say, yes, it's a cause. But if I were at the Harvard School of Public Health and discussing it, I would say it's a risk factor.

And that's not all. She said it again. She repeated it: I made a distinction already here today that I do not talk about high blood pressure -- I wouldn't talk about high blood pressure and smoking and elevated serums, cholesterol in a seminar, as cause. I call them risk factors. However, in a lay audience, I would call them cause.

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Ladies and gentlemen, this evidence raises a couple of really significant questions that I would respectfully ask you to consider in this case. How can it be fraud for a tobacco company to make a distinction between risk factor and cause, when the very expert witnesses the plaintiffs brought before you did exactly the same thing? Can't be.

How can it be fraud for a tobacco company to engage in a debate about the relationship of smoking and health, when the scientific community was engaged in the same debate? Can't be.

How can it be fraud for the tobacco company to exercise judgment about causation, when the Surgeon General himself said it's a matter of judgment? Can't be.

How can it be fraud for a tobacco company to say there needs to be three lines of evidence, when virtually all of science, including the very witnesses the plaintiffs brought to you in this case, say exactly the same thing? Can't be.

How can it be fraud for a tobacco company to say that causation has not been scientifically proven, when all science agrees that you don't have an animal model and you don't have the mechanism? Can't be. Can't be.

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Now, I need to mention one thing about this. Mr. Rosenblatt talked at length about Mr. LeBow, the CEO, the head guy of Liggett. And he makes a lot out of Mr. LeBow's current pronouncements about causation and his current pronouncements about addiction.

And I want to remind you what that evidence was.

In 1963, Mr. LeBow testified under oath that he --

MR. ROSENBLATT: Not '63.

MR. REID: '93. I'm sorry. Thank you. I turned my 9 upside down.

In 1993, Mr. LeBow testified under oath that he didn't know whether smoking caused cancer and he didn't believe it was addictive, but when he was confronted with litigation that could have potentially wiped out his company, he changed his mind. He did what was best for him. He did what was in his own economic self-interest.

He negotiated a settlement that was favorable to his company, and as part of that settlement he was required -- required to sign a settlement agreement saying smoking causes disease and smoking is addictive.

And you heard an argument a couple of days ago that Mr. LeBow had studied the issue before he

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changed his mind. But as part of that settlement, he said: I'm not a scientist, and he said: I haven't talked to any scientists, before he signed that agreement. And he hadn't reviewed any documents. He simply made a business decision.

And he did what he had to to survive. And he said he was glad to do it. And why wouldn't he be? He's an investor. That settlement and that change of position saved his investment in Liggett.

And there was talk about these devastating documents. But, ladies and gentlemen, you haven't seen any of these devastating documents from Liggett in this case, because there weren't any. Mr. LeBow did not have any.

It was overstated and it was done to try to sway you for reasons other than the evidence.

Now, when you go back to the jury room and you look at Question 4, you will have heard from the Court what the definition of fraud is. And there's a technical, legal definition of fraud. And I want to focus on three parts of it. You'll hear the whole discussion from the Court.

You have to prove that the defendants made a false statement of fact, and you have to say which defendant made the false statement of fact. You have

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to show that it was material; somebody acted on it. If nobody saw it or read it or heard it, it couldn't be material.

And finally, it has to be false at the time it was made.

I want to give you an example. If you want to get into the race car business and you go to the race car -- you go to the car dealership and you tell them that and they bring out a car, and they say: I have tested this car; it will go 200 miles an hour, and you take it out and you buy it and race and you lose and you find out they tested it and they already proved that it will only go 150, that's fraud. It's a statement of fact that is false.

But if you go to that same store and they say: I believe this race car is pretty fast, that's not fraud. That's a statement of opinion. And that's the difference. Statements of fact can be fraud if they're false and you meet the other requirements. Statements of opinion, if they're held in good faith, can never be fraud.

Now, I want to deal with some of the allegations, and there aren't many, because you'll remember when counsel was going through the documents, he was saying: Well, I'm not going to take time to

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tell you which company or who said what or when it was said, but the plaintiffs have to show you statements made by these specific defendants, because there's a question about each one.

I want to talk about the Tobacco Institute for a minute. You've heard this morning that Mr. Martinez had been kind enough to give me the time, and I'll just do it while I'm standing up here.

The Tobacco Institute, the plaintiff claims, made fraudulent representations that there was a controversy about smoking and health. That's the -- that's the bottom line claimed: false statement.

Well, ladies and gentlemen, I think we know now, the evidence is clear, that there is and there was and there has been a controversy, but the interesting thing is, the whole debate about this, the whole evidence started with this document right here: 3031. Remember it used the word "controversy," "continuing controversy," and there was a lot of criticism of the Tobacco Institute for issuing this. And the claim is made that that's just a false statement.

Well, you now know the evidence. You now know that that word "controversy" actually came from the writing of the Attorney General -- Surgeon General himself.

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Do you remember on cross examination, he was confronted with his own document that he wrote to Mr. Califano, and it said reaching scientific consensus -- and he was talking going into this '79 Surgeon General's Report -- could be difficult because of the controversial nature of several of the issues.

Now, that's important for two reasons. The first is, as late as 1979, even Dr. Richmond, who you saw, was agreeing that there's a controversy here.

And more importantly, ladies and gentlemen, it can't be fraud for the Tobacco Institute to use the same concept that's used by the Surgeon General.

But there's more to this document than that. And I will ask you to go back, when you go into the jury room, and look at 3031.

You were told yesterday, and I wrote these words down, you were told this was the phoniest -- that's one word -- you were told this was the most disgraceful document that somebody had ever seen.

But the interesting thing is, it was flashed in front of you and those words were said, but nobody asked you to look at it. Why didn't they show you the bibliography and all of the footnotes and the articles that are cited in here? Why didn't they show you those so they could point out the hacks that are writing in

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this thing, the non -- the poor science? Why didn't they do that?

The reason is clear, because if they had, among the 300 cites -- 300 cites of public literature, you would find cites to the Journal of the American Medical Association; you would find cites to Cancer, one of the publications you've heard about; you would find cites to the American Journal of Public Health; you would find cites to scientists, such as Dr. Wynder and Dr. Hammond and Dr. Doll; you would find cites from institutions, such as Roswell Park, you heard that mentioned before; from the Public Health Service and from the Department of Health, Education and Welfare.

I hope you'll look at this document, and you'll find that this document is far from being the phoniest or most disgraceful document that anyone had ever seen.

There's also a claim that the press releases -- and they're in evidence, and you can look at them, and you'll find that the Tobacco Institute in those press releases was taking positions that were supported by the public literature, and that public literature was being cited in those.

How can circulating published literature from accepted sources be fraud? Can't be.

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The complaint was made that the employees of the Tobacco Institute weren't scientists. Well, number one, they were publishing literature that other scientists had prepared; but, number two, you heard testimony that when they needed technical advice, they hired consultants, outside consultants. It can't be fraud.

You heard about another document, and it was written by Mr. Panzer. Mr. Panzer, he wrote it to Mr. Kornegay, who was the president, and a lot of discussion because Mr. Panzer suggested that there was some really bad plan that was going to be adopted. He was recommending adopting a bad plan. This goes back to what you heard today about documents.

Well, Mr. Kornegay testified about this a long time ago, before anybody knew that this would be an issue in this case, and he talked about Mr. Panzer, and he said: "Weird" is not the word.

He was highly intelligent, as anyone reading his memo could gather, I think. He never felt quite at ease and secure in his job. I say this out of kindness because Fred, I'm very fond of him, he constantly sought ways to attempt to impress others with his importance, if I could put it that way.

He was not in the policy-making end of the

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Institute, and yet reading some of his things he had written, such as this memo, you would think he was. So that's an important point.

And Mr. Heim this morning asked you, when you look at these documents, to let's get the whole story. He wasn't in the policy-making. Mr. Kornegay told you he didn't even remember getting the memo, and most importantly, none of the things mentioned in that document were ever done.

Ladies and gentlemen, thoughts, ideas, suggestions that were never implemented cannot be fraud.

And then you heard some questions about why Mr. Kornegay didn't come. Well, you weren't told he was any age and you didn't hear the whole truth about his current health. You just heard that --

MR. ROSENBLATT: Objection, Your Honor. There's no evidence in this record --

MR. REID: Your Honor, we need to go to sidebar.

MR. ROSENBLATT: -- That --

THE COURT: Overruled.

MR. REID: We need to go sidebar.

THE COURT: I think I told you a dozen times, if you need to make an objection, it's a one-word

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objection, "Objection," and then if you talk to me about it, what's stated, then I'll look at it and see what it is. Hold on.

Okay. I guess I have to ask you.

MR. REID: Yes.

(The following proceedings were had at sidebar:)

MR. ROSENBLATT: It's my objection.

THE COURT: Wait.

MR. REID: You made your objection in front of the jury, to which I objected.

THE COURT: Hold on a second.

He had an objection.

MR. REID: Yes.

THE COURT: Then you have an objection. So let's first find out --

MR. ROSENBLATT: My objection is that there's obviously nothing in this record about Kornegay's age or his health. And Reid is giving that as an excuse for why Kornegay was not here. He said: Let me tell you something --

THE COURT: Then you raise the question as to Mr. Kornegay.

MR. REID: "He was in good health"; that's why I said it.

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MR. ROSENBLATT: I didn't say he was in good health. I didn't say that. I didn't say anything about his health.

THE COURT: Your problem with Kornegay not being here is --

MR. REID: I said that --

MR. ROSENBLATT: It's generic. I talked about a lot of these witnesses -- no one -- I don't know that I ever said -- I said they didn't bring in anyone from the Tobacco Institute. They didn't bring -- I wasn't talking specifically.

MR. REID: Mr. Rosenblatt --

MR. ROSENBLATT: Obviously he wasn't here.

MR. REID: -- said he was in good health.

MR. MARTINEZ: Alive and in good health, quote, unquote.

MR. REID: I'm just saying he didn't tell them the whole story about his health. He didn't tell them the rest of it.

THE COURT: Which is?

MR. REID: He's not in good health. Well, he didn't know he was in good health.

MR. ROSENBLATT: I didn't say he was in good health.

MR. MARTINEZ: Yes, you did.

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MR. ROSENBLATT: Show me.
MR. REID: I will get you the transcript.
MR. HEIM: All right.
MR. REID: I'm going to move on. I'm going to move on at this point. I think it was a fair comment to what he said yesterday.
THE COURT: Yes. I agree with you, but --
MR. ROSENBLATT: I didn't say he was in good health.
THE COURT: Is he still employed?
MR. REID: No.
MR. HEIM: He is retired.
THE COURT: So you have no control over him anyway.
MR. HEIM: Right.
THE COURT: You couldn't have brought him in because you couldn't have subpoenaed him.
MR. HEIM: Exactly.
THE COURT: If you wanted to say a problem with everybody -- the retired folks, they also have some folks that are retired.
MR. REID: A huge part of the argument.
MR. ROSENBLATT: That was Osdene.
THE COURT: He may or may not be in good health. He may have declined to come down for whatever

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purpose.

MR. HEIM: You just can't make that missing-witness argument in these situations.

MR. REID: I'll move on.

MR. ROSENBLATT: Okay.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

MR. REID: So, ladies and gentlemen, when you're looking at this question of who was here and who testified, think of all of the evidence that you heard about that, and think about whether these companies, the Tobacco Institute or anyone, did the things that are suggested. And I think you'll find that they didn't, and it can't be fraud.

Now, another example of fraud that the plaintiffs argue about are the letters that came from the R.J. Reynolds Company to school teachers. And you've got these letters in evidence. And I hope that you will go back and read all four of the letters, the entire letters.

There had been argument about them and there had been allegations and assertions made about what they say and what they don't say. Each one is different, and you'll get a chance to look at them.

But they do all contain some common things.

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Number one, they describe the view that Reynolds Tobacco has, that more research is necessary.

That is our position. It can't be fraud, and there's nothing wrong with saying it.

Secondly, these letters state -- they don't all state this, but some of the letters stated that science has not been able to identify a particular component in cigarette smoke that causes disease.

That's an absolutely true statement, ladies and gentlemen. You heard from -- the quote from Dr. Leanderson, in 1990, agreeing with what Reynolds Tobacco Company put in one of those school letters: Although attempts have been made to find the ultimate carcinogen, no causal link between specific compounds and lung cancer has yet been found.

All of these letters encourage youth not to smoke; talk about how it's an adult activity. And these letters describe the company's views about scientific evidence.

It's not fraud to have those positions. It's not fraud to state those positions.

Some people may disagree with those positions, but, ladies and gentlemen, beliefs which are honestly held cannot be fraud.

And you may wonder what any of those letters

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have to do with this Florida class action, because not a single one of them went to anybody in Florida. But the truth is they don't have anything to do with the legal issue that you have before you in this case.

Now, the next claimed misrepresentation is The Frank Statement. And that's another one of those phrases that if we counted it, you'd probably find that it was mentioned a lot.

And before I go to that specifically, I would like to make a couple of general comments. Clearly, The Frank Statement was what was believed in 1954. It was a snapshot, if you want to call it that. It was published one day, one time, 45 years ago.

It was a sincere expression of belief at that time. It wasn't a guarantee that science would ever change -- would never change. That's what it was.

And now, as you know, over the years, as science has evolved, the positions have changed in light of the new science. And those positions have been publicly announced.

You know, I said that to be actionable or to be a fraud, there has to be materiality. It has to have caused somebody to do something.

Well, remember Dr. Richmond. He was the Surgeon General. Mr. Rosenblatt, in his argument, made

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much of the fact that some of the senior executives of the different companies hadn't read The Frank Statement.

Dr. Richmond, who advised his own patients and the government for 40 years about smoking and health, couldn't remember seeing it when it was published himself. And this was an area that he was completely interested in. Couldn't remember it. And he said he never met a person whoever relied on that Frank Statement.

And, in fact, not a single witness that you heard in this case, not a single witness, came in and told you that they'd even -- that they had even seen The Frank Statement in 1954.

Ladies and gentlemen, it was not a fraud. It was not untruthful in 1954.

Now, you remember Dr. Thomas, and I'm going to get a copy of it. Remember, Dr. Thomas came in and testified about this. And he went line by line through this document. And he talked to you about what the scientific evidence was in 1954, or roughly in that time period, that related to each of those things.

And that's why I told you a minute ago, when we made this chart, when we went through his testimony, I put The Frank Statement up there about where it would

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fall so you could get a feeling for what the science was at the time these statements were made.

Your task in this case is to determine if those statements were false in 1954, that day, when this was published, and if they were known to be false, and were they statements of fact.

Now, I'm not going to go through every line. If you read the top, it starts by talking about the experiments with mice, wide publicity. You've heard about the publicity, the awareness in the general population that this was happening.

And then it says: Conducted by doctors of professional standards. They don't believe that any serious medical research, even though its results are inconclusive, should be disregarded.

So the first thing they're saying is, even though this doesn't answer all of the questions, we think you ought to give it serious consideration. You ought to give it serious consideration.

And then it points out that eminent doctors -- there is a marker somewhere here -- eminent doctors and research scientists, right here, have publicly questioned the claimed significance.

Now, that's the first one they want to talk to you about. They say that's false.

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Well, you heard testimony from Dr. Cuyler Hammond, and he was the head of statistics for the American Cancer Society and he was a professor at Yale, and in 1954, he said, among -- you can read the whole quote, but the one that relates to this is talking about these mouse skin paintings: It doesn't prove a thing about the occurrence of lung cancer in human beings. Dr. Hammond said that. I'm sorry. Dr. Cuyler Hammond said that.

Dr. Wynder, in 1954, also said: The present mouse data -- do you remember, he's the one that did it -- the present mouse data do not influence the proof at hand linking smoking to lung cancer in man.

So there you have Dr. Hammond and Dr. Wynder, obviously eminent doctors and research scientists, who are questioning that scientific evidence.

Even today, ladies and gentlemen, people still believe this to be true. You saw a quote from Dr. Witschi, 1997: It is actually difficult to document an unequivocal carcinogenic effect of cigarette smoke in mice or other experimental animals.

So even though it was questioned in '54, it's still being questioned in 1997.

And Dr. Richmond told you there was a great difference between the back -- shaved backs of mice and

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the inside of a person's lung.

Medical research -- medical research indicates many possible causes of lung cancer. And you remember, you saw during Dr. Thomas' testimony, the Anderson textbook that lists tar, petroleum products, smoking, dust, silica, asbestos. An absolutely true statement. Dr. Whelan told you during her testimony and Dr. Hammond had also listed a similar set. That's a true statement.

The next statement: No agreement among the authorities regarding what the cause is. No agreement.

This has to do with plaintiffs' view that everybody had decided this question before The Frank Statement, and that is false.

I want you to remember, ladies and gentlemen, what Dr. Whelan said in front of you here: I have reviewed the literature, and I would say there was not a consensus, because there was a great resistance to the scientific and medical community to accepting the emerging data.

She also told you that the American Cancer Society was withholding judgment until more data had come.

And then Dr. Siegel. Dr. Siegel, the witness who could never be viewed as a friend of the tobacco

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industry -- talking about the 1950s, remember, the time -- you have to judge these statements when they were made: Do you agree that in the '50s there was a controversy in the scientific community about whether or not cigarette smoking causes disease?

His answer was yes.

Later on he said the same thing: I would certainly believe that in the '50s, there was not complete and total agreement in the scientific community.

These are words you heard in this -- from this witness stand in this case. Clearly, ladies and gentlemen, from the witnesses brought by the plaintiffs, that is a true statement.

Number 3: There is no proof that cigarette smoking is one of these causes.

Now, at this point in time there was evidence that had begun to come out. There was the mouse skin painting that was pointed out. You also know there were the five epidemiological studies. But there were -- so there was evidence, but the evidence had not risen to the level that any scientists were willing to say: We have proof; we've proved the cause to make that a false statement.

Dr. Whelan told you that there were prominent

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scientists who expressed doubt. And she told you that respected scientists at the National Cancer Institute did not believe causation had been proven in the mid-1950s. She said that from this witness chair.

And Dr. Richmond, he told you about a debate that was going on in the same time frame in the American Medical Association. On one side of the debate, people who said smoking causes; on the other side, doctors who say we don't think it's been scientifically proven, that's correct.

So there was a controversy.

One could say it was a controversy.

So Dr. Richmond told you that it was a controversy.

Dr. Richmond also told you that the National Cancer Institute scientists in the '50s believed that smoking had not been linked; that the link had not been scientifically proven.

Again, ladies and gentlemen, that's a true statement from the words -- from the mouths of the witnesses that the plaintiffs brought to this case.

Then the statistical evidence could apply to other aspects of life and the validity of the statistics as being questioned by scientists, numerous scientists.

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Dr. Whelan told you about Dr. Berkson, and he was involved in the early statistical analysis, and he questioned the statistical evidence.

Ten years after this -- remember the very first or second quote we saw today from the Surgeon General said: You can't prove causation with statistics alone.

So the Surgeon General, ten years later, would still agree with that statement, that statistics have been questioned.

We accept an interest in people's health as a basic responsibility -- that's the next statement -- paramount to other concerns, every other concern of our business.

Now, counsel wants you to believe that this is an either/or. And I would submit to you that it is a false either/or.

Plaintiffs say: You're either interested in profit or you're interested in health. And you've heard over and over -- you're going to hear more about this, as we proceed tomorrow -- that the plaintiffs have argued that these companies did not care about health. That's their position, because they want you to believe that that's false.

Well, ladies and gentlemen, both questions

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are important. This is a product, a legal product, but a product that has had known risks, health risks. Everything about this product, over the years, has had to deal with the question of the health risks which everybody was aware of. It had to be addressed.

These companies could not have ignored the health side and focused on the bottom line. And you're going to hear about all of the evidence that would have contradicted that assertion.

But I want you to remember what Dr. Carchman said when he was here. Dr. Carchman was asked about this very document, and he said: When I looked at it, spent a lot of time thinking about it, and what I ended up doing was I looked at myself and I said, you know, that's really what I've been doing, and people like me have been doing in the company.

And then he said something else: So when I look at that, I say to myself, that was my job -- and you remember all of Dr. Carchman's credentials and work with the medical schools and all of his research work, before and after he was involved with Philip Morris: That was my job. That was the job of people that I took over for, and when I left, there are people behind me doing the same thing.

And you're going to hear more talk about the

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design of cigarettes and about all that the companies did, so I won't take time to mention that now.

The plaintiffs have to prove that at the time this document was written, these people didn't believe those statements to be true.

And you know, this was so long ago, and it's one of the problems we have, in having put ourselves back in the '50s, but, you know, there is one document that's interesting. It was a document that was prepared at the time, just prior to this statement, and it was prepared minutes of a meeting at Hill & Knowlton, which you heard about, among tobacco company representatives, talking about what their plans were.

And this person wasn't writing this because this person thought there was going to be a Dade County jury in 1999 looking at this and deciding what people thought, but this is one of the documents that has survived, and the plaintiffs put this document in.

And this was the belief at the time. They believed that there was not a sound scientific basis. They believed that these were sensational accusations at that time; they were premature. They pointed out that the U.S. Public Health Administration had officially refuted the tie between tobacco smoking.

And this is the most important, ladies and

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gentlemen, because it relates to this. This was written when people were sitting around a table and someone was taking notes, long before we were thinking about litigation.

Do they -- the writer was asking this question -- do they accept the principle that public health is paramount to all else and would they issue a public statement spelling this out?

Everyone present wholeheartedly agreed to this principle and readily consented to a widespread dissemination of a sound statement of principles. That's the only document you've seen that bears on the question of what was in the minds of the people.

I have been talking about the extraneous evidence, evidence that other witnesses have shown to you, that prove that these things are true. That's the only thing that's in the mind. And that's a significant, powerful document, ladies and gentlemen.

And then the next statement: We believe the products we made are not injurious to health.

And you know what the plaintiffs say about that? They point to one piece of evidence. I've got it right here. They point to a document that was prepared in 1953 by a man named Claude Teague. It's Exhibit 78.

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Look at it when you go back there. This was a document prepared by a young scientist at the RJ Reynolds Tobacco Company. This document, ladies and gentlemen, no matter how you cut it, does not prove that is a false belief.

What you will see is that this document is a book report. RJ Reynolds sent Mr. Teague to the library and said: Research what's in the public literature about smoking and health.

You'll find 78 citations to the public literature. Nothing secret; hidden at Reynolds. Public literature. And we know that's what he was doing, because on the first couple of pages it says: The object of this report is to give a broad general survey of cancer research. And then -- and you see the bibliography.

Nowhere in this document does this author say, I have proved, it has been proven, I have concluded that smoking causes disease.

In fact, it doesn't reach that conclusion at all. And when you go through it, you'll see things like, in spite of observation, research and theorizing, for the past 20 years, the cause of spontaneous human cancer is still unknown. That's right in this document.

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And if you go through and read it, you'll find the author is saying -- uses words like, it has been suggested, there's speculation, there appears, there's growing speculation.

But, ladies and gentlemen, go to his final conclusions, what he recommends. Number one, he says: It's recommended that Reynolds do supplemental surveys, just like this, on a regular and thorough basis;

Secondly, that Reynolds subscribes to the journals that he was finding, to be sure that they got these documents and these books inhouse so they could look at them also;

Thirdly, examine all tobacco additives and flavorants. That's what he recommended.

And you're going to hear a lot about what the company did about that tomorrow.

And finally, he recommended that management take cognizance of the problem and its implications, and that positive research action be planned and initiated without delay.

Ladies and gentlemen, this was a responsible company acting in a responsible way, educating itself about the public literature. That's what this document shows.

And you know, Dr. Siegel again, you could --

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it was suggested to you that this was somehow some secret document that would have made a difference if it had been published.

Dr. Siegel testified, and this was at Page 13566, he's admitted that this document was a summary of the published literature. And then he said -- and this is a quote -- I am not suggesting that this information was hidden.

Now, as science changed -- as science evolved, as we learn more, as there were more epidemiological studies, companies reacted to those.

Remember, there have been warnings on these cigarettes since the '60s. How could anybody claim that that fact being the case, that this document, this 1954 document, that they relied on -- I'm sorry -- I'm pointing to the wrong one -- this 1954 document they relied on, how could they say that?

And Dr. Carchman and Dr. Townsend told you that companies wouldn't make that statement today. Remember that was a snapshot. It was a statement of belief. In fact, it even says: We believe. We believe.

And, ladies and gentlemen, a statement of belief cannot be fraud.

The final statement that I want to mention

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now is that we always have and always will cooperate with those whose task it is to safeguard the public health.

Plaintiffs claim that this was a false statement when it was made in 1954. They say that we've never intended to cooperate, and they told you yesterday that we never cooperated.

But they didn't give you any examples. The best they could do was say Dr. Steinfeld, when they asked him that question, was: Well, not really.

They said: Do you cooperate -- did they cooperate with you?

And he said: Not really.

The reality is, ladies and gentlemen, the reality is, the only cooperation that would satisfy many of the people who testified for the plaintiffs here, the only cooperation that would satisfy those folks would be if these companies went out of business. And you know that to be true.

And you heard counsel argue to you two days ago that the only moral, ethical and religious thing to do is to get out of business.

Do you remember I started by telling you, this was like a heresy trial, and now you've heard, the claim is that the only moral, religious and ethical

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thing to do was to get out of business.

Ladies and gentlemen, this record is full of examples that make that sentence true. Full of examples of cooperation.

Before the government walked away from the attempt to develop a safer cigarette, this industry worked with the Tobacco Working Group, and Mr. Ross is going to tell you about that. This industry worked with the FTC on that smoking machine that you heard about. This industry funded that big, thick bunch of books, the Larson text, that Mr. Schneider is going to tell you about, that gathered together all of the research that was out there.

This industry provided information to the Surgeon General's Advisory Committee in 1964. This industry followed up almost every suggestion made by the public health community about what might be the problem with cigarettes and how they might be improved.

Ladies and gentlemen, you're going to hear a great deal of evidence talked about on the subject of cooperation.

Now, what I've been talking about is essentially the things that I've underlined, to the left side of The Frank Statement there. And I've talked about the cooperation in that regard.

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Now, I'm going to sit down for a little while, and I get to come back later, but for now I'm going to sit down, and Mr. Moodhe is going to come over. And Mr. Moodhe is the lawyer for the Council for Tobacco Research.

I've been talking about the state of medical knowledge; he's going to talk to you about the cooperation of this industry in funding millions and millions of dollars in scientific research through CTR.

He's going to talk about the other side of this Frank Statement.

And that is a significant example, ladies and gentlemen, of just the beginning of the story of the cooperation of this industry, more about which you'll hear tomorrow.

Thank you.

MR. MOODHE: Good afternoon, Your Honor, ladies and gentlemen of the jury.

It's been a long time since you heard from me. I represent the Council for Tobacco Research, together with my partner, Anne Cohen, who's in the second row back there in the gray suit.

And the fact that it's been a long time reminds me, like my colleagues, to thank you personally for the attentive and dedicated and good human service

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you've rendered during this long trial. It's only because of people like you that our clients would get a fair shake in a long trial like this.

Now, as you know, the Council for Tobacco Research traces its origins back to the 1954 Frank Statement that Mr. Reid has just been discussing with you. The Frank Statement announced the formation of a joint industry group that was going to fund research into all phases of tobacco use and health.

So what were you told about this research program during the course of this trial? Well, let me give a few examples of what you were told.

You were told that the scientific advisors who led this research program were distinguished scientists. You were told that the researchers that CTR supported were located at good universities and medical schools. You were told that hundreds of scientists had been funded by CTR.

You were told that the research was also supported by other public health agencies. You were told that the research was published in the leading medical journals and scientific journals.

You were told that the research was very valuable. You were told that the research was cited in the Surgeon General's Reports on smoking and health.

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You were told that CTR research led to low-birth weight studies 20 years before information about that went on the warnings on cigarette packs.

And you were told that the research CTR funded -- aided public health authorities to make decisions about what to tell the public about the risks of smoking.

Now, who were the witnesses who gave you that information? Who made those statements? Well, actually every single one of those statements was made by the very first witness you heard from in this trial. That's right. The former Surgeon General of the United States, Julius Richmond, presented by the plaintiffs.

And everything you heard after that first day confirmed that CTR was an outstanding research organization that contributed mightily to the development of medical and scientific knowledge concerning health issues related to smoking.

Now, there was some cynicism expressed in this courtroom by plaintiffs' witnesses, and there are a handful of documents that plaintiffs dug out from the companies' archives that contain some skepticisms and criticisms as well, but the evidence has shown that all these criticisms were misplaced and that the ideas in these old documents were ignored at the time and since

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long forgotten, until they were resurrected and made chips in an effort to win a larger pot of money in a lawsuit.

Before reviewing the evidence about the Council, let me remind you who came here to testify about the Council.

First, Dr. Harmon McAllister, CTR's scientific director since 1991, and an employee of CTR for 17 years; a scientist with a background in cancer-related research, and a university administrator familiar with how research is funded in this country.

Now, Mr. Rosenblatt tried real hard during his closing argument over the last few days to convince you that this man, Dr. Harmon McAllister, was not to be believed. But he was here for two days. And you can judge his credibility, his knowledge, his understanding of the scientific issues surrounding smoking and health, his dedication to finding answers that would do some real good, instead of just look good on a piece of paper.

Now, Mr. Rosenblatt complained we didn't bring you members of the Scientific Advisory Board, the Council for Tobacco Research. Well, I guess if I had, our closing arguments would probably be interfering with your Christmas shopping, and I'd still be accused,

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then, of bringing witnesses who had a vested interest in defending the decisions they'd made.

So, instead, we went outside CTR and brought you Dr. Susan Oparil, one of the country's most outstanding scientists and brilliant heart specialists, first in her class at Columbia Medical School, board certified in internal medicine and cardiology; a doctor with a long public health service record, culminating in her term as president of the American Heart Association, a professor of medicine, teaching young doctors at the University of Alabama, while also caring for patients.

Dr. Oparil came here to talk to you about her experiences as a grantee of CTR, and also about the contributions that CTR has made to scientific and medical research in this country, a highly regarded scientist, as every bit as credentialed as any witness Mr. Rosenblatt presented, and who had nothing to gain by testifying in support of the organization whose good work has been sullied by the attacks of plaintiffs' witnesses in this case.

By the way, yesterday Mr. Rosenblatt suggested to you that because Dr. Oparil was such an outstanding physician, we were afraid to ask her whether smoking causes disease.

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No. We simply let Mr. Rosenblatt do that. Dr. Oparil told you the concept of causality is complicated. And I think if you take the statement, a scientist who is very strict about causality, could, for example, postulate that in order to cause a disease, something must be both necessary and sufficient, and would say that tobacco has not been proved to cause any disease.

She then went on to explain that physicians and people in the public health community may use different terms, exactly what we and other witnesses have intended in this trial. I guess Mr. Rosenblatt forgot that he asked that question and got that answer.

And during plaintiffs' case, you were also read the depositions of Dr. James Glenn, CTR's chairman and chief executive officer, who himself has had a long, distinguished career in medicine.

You heard from Mr. Robert Gertenbach, the former president of CTR; and Dr. Vincent Lisanti, a long-time scientist who's worked with CTR for the better part of 30 years. You also heard from various tobacco company executives about their contacts and experience with CTR.

Now, who were plaintiffs' principal witnesses? Well, first Dr. Michael Cummings, a public

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health advocate whose opinions about the Council were based on a simplistic word search through the titles of publications of CTR-funded research, and a survey that was about as slanted against the Council as its preconceived biases would allow him to design.

Plaintiffs also played you the videotape of Dr. Freddy Homburger, a disenchanted scientist who recounted a 20-year old tale about how his long support by CTR had ended, but it was a tale that was contradicted by the contemporary documents recording those events.

In evaluating the evidence I'm about to review with you, I want you to keep in mind the source of the evidence; the nature of the evidence; the amount of knowledge the witness had; the amount and depth of the work, or the lack of it, that underlie those opinions; the circumstances surrounding the events described; and whether the evidence is consistent with and corroborated by other evidence in this case.

In other words, keep your eye on the entire picture. Don't just see a little fragment of it.

Let's talk about more facts concerning the Council for Tobacco Research, and let's go back to the birth of the Council in The Frank Statement.

In The Frank Statement, as I pointed out,

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there were responses that they were pledging aid and assistance to research efforts into all phases of tobacco use and health. That's a very broad and open-ended statement, appropriate since the tobacco companies' sponsors at that time did not know where scientific investigation was going to lead.

To support this newborn, the sponsors offered joint financial aid, but the companies also saw the wisdom of letting this newborn be guided through life under the tutelage of the best minds they could make available to help it in its mission.

In charge of the research activities of the committee will be a scientist of unimpeachable integrity and national repute. Where did the sponsors find such a person? Well, the first scientific leader unquestionably was Clearance Cook Little. You heard him described here, a world-renowned geneticist, a leader in cancer research, the head of two great universities: The University of Michigan, the University of Maine.

The founder of one of these country's great research laboratories, and for 16 years, Dr. Clarence Cook Little led the organization we know today as the American Cancer Society.

Did you hear any serious suggestion that

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Dr. Little was anything but a scientist of unimpeachable integrity and national repute? Of course you didn't.

And over the rest of the life of the Council, the company sought to it that equally outstanding scientists led the research activities of the Council.

Recall Dr. McAllister's and Dr. Oparil's descriptions of those who followed in Dr. Little's footsteps: Dr. William Gardner, professor of anatomy at Yale University Medical School, author of 200 publications on medicine and science, president of the International Union Against Cancer, president of the American Association of Cancer Research;

Dr. Sheldon Sommers, a nationally known pathologist, affiliated with one of New York's finest hospitals, Lenox Hill, who was on the faculty of Columbia and Harvard medical schools;

Dr. James Glenn, a world-renowned urological surgeon, dean of the Emory Medical School in Atlanta, dean of the Mount Sinai Medical School in New York, in fact, president of the entire Mount Sinai Medical System in New York, head of the Markey Cancer Center in Kentucky.

Dr. Glenn served as scientific director between 1988 and 1990, at which point he became chief

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executive officer of CTR, to continue his oversight of the research program, aided by Dr. McAllister.

Again, did you hear any serious challenge to the credentials, to the dedication of these scientists? No.

So let's turn to the next sentence of The Frank Statement: In addition, there will be an advisory board of scientists disinterested in the cigarette industry, a group of distinguished men from medicine, science and education who will be invited to serve on the board. These scientists will advise the committee on its research activities.

So, was this intention carried out? You've seen that it was.

Before describing these advisors, let me remind you that Dr. McAllister and Dr. Oparil both took the time to explain to you in detail the process by which grants and contracts were evaluated by the Scientific Advisory Board. Both of them observed that the procedures followed the models used by other grant-giving agencies in this country, like the National Institutes of Health, like the American Cancer Society.

And Dr. Oparil, whom you'll remember had just been asked recently to lead and design the procedures

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for a 200 million, U.S. government program into breast cancer research, told you that the procedures followed by CTR were standard peer review.

And that process, where the ideas come from outside scientists through their applications, ensures that CTR is funding not what the companies might think is good research, but what the scientific community thought were the best ideas to pursue.

Did Mr. Rosenblatt ever show you one single idea -- one good idea that was not funded? No. Because he can't.

So, who were the peer reviewers, the disinterested scientific advisors? Remember what you were told by Dr. Oparil, who knew a few of them as giants in their field: Dr. Jacobson from the University of Chicago, who pioneered radiation as a curative therapy for cancer; Dr. Julius Comroe, a well-known pulmonary specialist. Dr. McAllister told you there was Dr. Richard Bing, a famous cardiologist who pioneered the study of nicotine's effect on the heart.

And look at the scientists who followed these people, equally outstanding leaders in medicine and science. Do you remember what Dr. McAllister told you? Six out of 17 of the most recent Scientific Advisory

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Board members -- that's 30 percent -- have been elected to the National Academy of Sciences, an organization which elects only one-half of one percent of the scientists in this country. 30 percent of the members of the Scientific Advisory Board belong to the National Academy of Sciences.

And look at the credentials and stature of these scientists. Do you seriously think all of these brilliant, accomplished scientists were somehow duped, somehow they could not appreciate or understand the scientific research that was being funded or what its importance might be to the truth about smoking and health issues? Or is it more likely they were well aware of what questions needed to be answered and where best to spend money to move the ball forward?

Another key corroborating factor. For more than 20 years, from 1962, just before the first Surgeon General's Report, through 1986, a member of the United States government's National Cancer Institute sat on the Scientific Advisory Board of CTR.

Now, stop to think about that for a moment. For 25 of the years that the plaintiffs would have you believe that CTR -- that there was no more need for scientific research because no questions remain, that CTR was falsely issuing statements, calling for more

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research, for 25 of those years, a scientist from the National Cancer Institute was sitting on the board of the SAB. Do you seriously think these government cancer specialists would have condoned a phony research program or participated in an alleged conspiracy to create a false controversy?

Now, did plaintiffs' experts question the credentials of any of these people? No. In fact, quite the opposite.

Dr. Cummings described the members of the Scientific Advisory Board as esteemed scientists. Dr. Homburger, the former CTR grantee, said they all had excellent reputations in the scientific community. Dr. Julius Richmond personally knew two of the SAB members: Dr. Karnofsky of Harvard, whom he described as a fine biochemist, and Dr. Robert Huebner of the National Cancer Institute, whom he described as a very distinguished scientist who had contributed very important items in the investigation of cancer.

The only criticism that you heard was the suggestion by plaintiffs' counsel that some of these scientists also received funds from CTR while they were on the SAB.

Remember Mr. Rosenblatt's big chart listing the SAB members and all of the years they supposedly

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received funding? A chart that Dr. McAllister immediately recognized, was all screwed up because it dramatically overstated the amount of funding these scientists had received.

Mr. Rosenblatt even had dead scientists getting money from CTR. Was that intentionally misleading? No. No. But in the zeal to prove a theory, facts were carelessly misstated to you.

And that's why I say, look at the source, look at the amount and nature and care of the work that went into the evidence and opinions that were put before you.

Now, the fact is, at times, SAB members did get research funds from CTR. Was there anything wrong or improper about that? No. Dr. McAllister explained that it's a regular practice at virtually all funding organizations, including the NIH.

And Dr. Oparil confirmed Dr. McAllister's point that no one would want to serve on any board where the researcher or the institution with which they were affiliated were barred from getting grant funds.

And CTR followed procedures to ensure fairness. The board member is excluded any time applications in which they may have an interest in having funded are discussed.

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Is it surprising that sometimes these scientists successfully competed for funds? No. After all, they were among the leading research scientists in the country.

So what did CTR do over the next 45 years? It funded research. A lot of it. Remember the facts you were told? Over $300 million was spent to fund research. That's equal to three quarters of a billion dollars in today's value.

1,200 independent scientists were given funds to pursue the best ideas that the scientific community had to offer about understanding and conquering cancer, emphysema, heart disease and the other diseases associated with smoking.

Support was given to five scientists who went on to win the Nobel Prize in medicine, including two in the most recent round, for their work with nitric oxide, a compound produced by cigarettes; work that both Dr. McAllister and Dr. Oparil explained had led to important understandings about how cancer and heart disease may occur and be cured.

Research being funded in over 300 of the finest universities, medical centers and research laboratories in the country, look at this map: Harvard, Yale, Columbia, Johns Hopkins, Emery, the

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University of Miami, the University of Texas, Duke, Stanford, Berkeley, the Mayo Clinic, the University of Chicago, $50 million alone to the institutions from which plaintiffs experts came, to which patients and scientists alike look hopefully for the answers on how to treat and cure these diseases.

6,500 papers were published in the finest scientific and medical journals in the country.

Now, plaintiffs challenge none of these impressive numbers, which prove a substantial commitment to aid and assist research into all phases of tobacco use and health, except, they say, there are three institutions and one medical society whose journals have adopted policies refusing to accept CTR-sponsored research or articles. And, they add, the American Medical Association has urged medical schools to reject CTR funds.

Now, why did they make a big deal out of that? It's because they want to leave you with the impression that those policies were adopted because something that CTR did was wrong. Did you get that impression? Well, if you did, you should be quite upset, because that's a false impression from the presentation of the limited evidence in the face of the following facts of record.

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Their witness, Dr. Michael Cummings, testified that the decision by his institute, Roswell Park, to close its doors to CTR was not based on the notion that CTR research was of poor quality.

Their witness, Mr. Carl Booberg, from the American Thoracic Society said the decision of their journals to close their pages to CTR had nothing to do with the importance of the research or its effect on humanity.

Their witness, Dr. Douglas Johnson, testified that before Massachusetts General Hospital adopted a CTR boycott, he, himself, had participated in approving the acceptance of CTR funds for research at the hospital.

Now, our witness, Dr. Oparil, told you that not one medical school in the country, including the Harvard Medical School, which Mr. Rosenblatt threw into the mix on Monday, had heeded the AMA's call, and it's those medical schools that are in the best position to judge the merits of the research being funded in their laboratories.

And even Mass General went out of its way to confirm that.

Dr. Oparil read to you from the Mass General policy statement the following language: No aspect of

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these policies should be construed to impugn the integrity of scientific contributions of current or previous recipients of research from the CTR or TRC. In all cases, these proposals have demonstrated adherence to rigorous scientific standards and have conformed to the guidelines for the conduct of sponsored research at the hospital.

These three institutions, out of 300 institutions and every medical school in this country that have not, and this one society's journal, out of hundreds of journals, that have not adopted these policies, not because what they thought CTR was doing lacked merit, but because somehow they simply thought taking money that originally came from the tobacco industry was inconsistent with their public health roles.

Now, they may have been sincere in adopting those policies, but let me ask you to think about this. Does it promote the public health to walk away from cooperation of CTR and to prevent independent scientists from researching and publishing on potentially ground-breaking matters relating to cancer and other diseases, like the Nobel Prize winning work that CTR helps sponsor?

I submit to you, ladies and gentlemen, that

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the only undisputed evidence of actual suppression of scientific research you have heard in this trial is the door-closing and page-closing policies that plaintiffs and their witnesses have urged.

If you're going to get angry about anything in this case, then, please, get angry about being led to the wrong conclusions. And get angry about wrong-headed policies urged by plaintiffs and their witnesses that impede the real progress needed to treat and cure diseases.

So what else do plaintiffs complain about? Well, it's great research, Dr. Cummings tells us, but much of it has nothing do with smoking and health; it's all about cells and DNA and microbiology.

And as I sat there and listened, I said to myself: Where has Dr. Cummings been these last three decades? That's what medical and scientific research is all about. What types of research are you reading about in newspapers when they discuss the latest advance in cancer?

What are our high school and college students studying? Culture slides on CD ROMS on the inside of cells, or grainy, black-and-white film strips of smoking beagles?

It's ironic, plaintiffs say, quite

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incorrectly, that we're wed to our views from the 1950s, when it is Dr. Cummings who would have CTR stuck back in the 1950s with techniques and ideas half a century old.

So let's turn to the details of CTR's research program. Dr. McAllister took the time to walk you through the history of what the CTR has done. He first explained to you the research that CTR supported in the area of epidemiology, and you remember the famous Framingham heart study discussed by several experts in this case, a long-term epidemiological study for risk factors for heart disease, including smoking. In the 1970s when the federal government cut off funding for the Framingham heart study, CTR joined forces -- it cooperated with other public health community agencies to keep that study alive.

You recall Dr. McAllister also explained to you how CTR supported skin painting studies, the first crude efforts to experimentally test the smoking-cancer hypothesis, but which were readily recognized as not translatable to the human lung.

So the next step was animal inhalation work, exactly the sort of experimentation that scientists and the Surgeon General thought might give the biological evidence to explain the statistics.

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CTR spent millions of dollars on animal inhalation work; yet, as Dr. McAllister, and every other witness who's testified in this trial has told you, those efforts were unsuccessful in producing lung cancer in animals, even though other things like diesel fumes did.

Dr. McAllister also explained the work CTR supported in fractionation studies, the studies of the components of cigarette smoke, like benzopyrene, like nitrosamines, like carbon monoxide, that scientists have theorized at various times might be the culprit in causing disease.

Again, as others have testified in this case, no research has allowed a scientist to say: We got it. It hasn't happened.

CTR also funded a wide variety of work into the effects of nicotine on human psyiology, including work that was co-authored and relied upon by plaintiffs' expert, Dr. Neal Benowitz.

All of this work clearly, undisputably relevant to understanding smoking and disease.

But these experiments didn't give us the answer, just as the rest of the scientific community didn't get the answers through their parallelled efforts. So CTR moved on.

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But Dr. Cummings remains unsatisfied. He says because a lot of CTR support has gone to basic science research, its relevance to smoking and health is remote. Just seems no matter how good the research we do, Dr. Cummings will never be pleased.

And I suggest that Dr. Cummings' closed-mindedness is reflected in the superficiality of the methods that he used. Remember how he said he formed his views? He said he looked to see if the word "tobacco" or "smoking" or "cigarettes" had appeared in the title of peer-reviewed articles published by CTR grantees.

Now, I don't think you really had to have Dr. McAllister or Dr. Oparil come here, as they did, to tell you that was a poor and unreliable way to go about evaluating the value of a body of peer-reviewed scientific research. Even Dr. Cummings himself described it as a very quick and dirty analysis of the titles of the report.

And Dr. Cahan, who did a similar but quicker and dirtier analysis, said it would be presumptuous to describe a research report by its title, and that even though this is exactly what he did, he admitted it was not a representative or systematic review of the research funded by CTR.

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Moreover, when Dr. McAllister applied Dr. Cummings' methods to the titles of the proposed projects that the SAB had received and evaluated, his percentage of smoking-related studies was markedly higher. Better than 60 percent met Dr. Cummings' key word test during the first 15 years of CTR's existence.

And by contrast, you'll remember Dr. McAllister applied Dr. Cummings' key word test to the Surgeon General's Reports on smoking and health, and he found that better than half of the titles' reports failed that test. In some years, 60 to 80 percent of the titles. Indeed, even in Dr. Richmond's anniversary 1979 report, 51 percent of the titles failed.

So, what is it? Is it that the Surgeon General's Reports are citing irrelevant research, or is it Dr. Cummings' methods that are irrelevant?

So what's the true test? Reading the articles. Reading the abstracts themselves. And that's what Dr. McAllister and Dr. Oparil took the time to do, and then took the time to come here and talk to you about. And they tested them against what they knew to be the unanswered questions.

You'll recall Dr. McAllister spoke to you about the different theories of disease causation, a

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single bullet, like the smallpox or AIDS virus, the short circuit, a gene missing that may lead to PKU, or the far more complex multi-step process that's believed to lead to lung cancer.

He explained to you how basic research is directed to figuring out what's inside that black box that Mr. Reid was discussing with you earlier, to identify the points, to map out the connections, to fill in the blanks, to figure out what's necessary, what's critical.

It's the research on genetics and microbiology that's used to fill in those blanks, and that's what these studies are all about.

By the way, Mr. Rosenblatt accused Dr. Glenn, one of this country's outstanding medical doctors, of a mean, vicious fraud, by saying it would be impossible to prove that smoking causes disease.

And this is an example of taking testimony out of context, because as you can see, Dr. Glenn gave that answer in the context of defining cause as a direct one-to-one relationship, the silver bullet theory that Dr. McAllister was talking to you about, the theory that we know does not apply to lung cancer, or the other diseases associated with smoking.

Now, you'll remember that Dr. McAllister and

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Dr. Oparil were able to explain many of these titles, scientific terms and how they related to smoking and health. Dr. Oparil used her own research to illustrate that point. By contrast, Dr. Cummings had to admit he really couldn't decipher the significance of all those titles.

And by the way, you also may recall that Mr. Rosenblatt questioned Mr. Gertenbach, CTR's former president, a layman, who did not participate in evaluating applications, about some of these titles during his deposition, and naturally, Mr. Gertenbach had a little trouble explaining them.

But did you notice that Mr. Rosenblatt did not dare play that game with Dr. McAllister or Dr. Oparil while they were in the witness box? Because they have the information to give you answers and explanations that the plaintiffs didn't want you to hear.

Let me expand a bit here. You know, Dr. Richmond volunteered during his testimony that there might be an unknown genetic factor, which he called the X factor, that makes people vulnerable to lung cancer.

Consider this, please. If it turns out that Dr. Richmond is right and there is an X factor that is

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necessary to get lung cancer, wouldn't it be scientifically more accurate to say that that X factor is the cause of lung cancer, even if smoking would play a role or -- in many or most of those cases?

In judging us for the reasonableness of what we have done and for the reasonableness of what we have said about the need for further research before making definitive statements on causation that permit no further discussion, consider that the fact that answers to the questions like that are real and they are important. But this is simply not a case of taking Dr. Oparil or Dr. McAllister's word over that of Dr. Cummings'.

There's other evidence to corroborate them, objective evidence: The Surgeon General's Report citing CTR-funded studies more than 600 times;

The Surgeon General's Reports themselves relying on basic science research, produced by others;

The fact that a large proportion of the basic research that CTR has funded has also been supported by other organizations and government agencies, like the NIH, the American Cancer Society, the American Heart Association;

CTR research being most often published in the same prestigious journals that are the most cited

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by scientists, as Dr. McAllister explained to you;

The reliance of Dr. Benowitz on CTR-supported nicotine research; indeed, his co-authorship on a paper that resulted from CTR funding and even what plaintiffs own witnesses had to say.

Dr. Richmond agreed that research directed at understanding the role of genetics or subcellular activity is relevant to understanding the etiology -- that's the cause -- of diseases associated with smoking.

And Dr. Cahan told us that basic research is going to be the solution to this problem of smoking and health issues.

Well, Dr. Cummings had a fallback position. He says: Listen to the people who have gotten CTR funds over the years. One out of seven of them say their research wasn't related -- only one out of seven, I should say -- say their research was related to smoking and health.

But remember how he got that data? A one-year snapshot survey of a very small percentage of CTR grant recipients.

By his own testimony, he undercut the integrity of that survey. He told us three things that could produce unreliable results: leading questions,

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statements not supported by the data, and questions that seek socially desirable answers, what the surveyor wants to hear.

The survey flunked all three.

First, he used leading questions, slanted to get negative answers. Dr. Cummings knew that CTR was funding research related to understanding the etiology, the cause, of diseases alleged to be related to tobacco use. That's how he described CTR's mission in his article.

But he did not ask that question. Instead, he asked whether the scientists were focused on the effects of tobacco use.

You can see the questionnaire. It's Exhibit 27592 in evidence.

He asked that question because he already knew most scientists would answer no, because they would interpret that question as asking them if they were working with tobacco, rather than proteins or nicotine receptors or DNA.

Indeed, Dr. Oparil, who was an intended recipient of the survey, said she would have answered no to that question, even though her own research had direct application to understanding how carbon monoxide found in cigarette smoke might produce cardiovascular

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disease.

Dr. Cummings deliberately framed his question so he would produce answers to fit his preconceived negative use about CTR. In short, the fix was in.

Second, he put into his articles statements unsupported by his survey data; for example, speculating that the industry might retaliate against respondents, when only he -- not CTR, not the industry -- only he knew the identity of the respondents.

And finally, the clincher. An unapologetic effort to produce a socially desirable response. The cover letter he sent with his survey, Exhibit 27598.

He let the recipients know that the survey was being conducted by the Roswell Park Cancer Institute. He then conditioned the recipients by telling them that the overwhelming majority of their peers believed that smoking causes disease, which the industry pretends is still an open question.

And then he tells them that the tobacco companies misrepresent the facts.

Even Dr. Cummings admitted that the message was: If you don't agree with this proposition, you are isolating yourself from the rest of the scientific community and associating yourself with a bunch of

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liars.

How can anyone, regardless of their skill in designing surveys, argue that this was not the basest effort to bias the way respondents answer the survey?

Ladies and gentlemen, let me remind you what Dr. Cummings suggested was the reason he had such a low response rate to his questionnaire, because busy scientists tend to throw this type of material in the waste basket.

I suggest we do the same.

Now, plaintiffs say there's other evidence that the research was not relevant. Look what people inside the companies were saying about CTR. And there were some frequent critics of CTR: Tom Osdene, Helmut Wakeham. Mostly from the '60s and '70s.

But nothing could speak more eloquently to the independence of CTR's research program than the fact that every once in awhile over the years, company officials, sometimes lay people, sometimes lawyers, sometimes scientists, questioned what CTR was contributing to the industry.

If it was just a puppet of the companies, why were these people complaining about CTR for ten years?

Common sense tells you that the comments were being made because the companies had no control over

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the direction that the scientific directors and the Scientific Advisory Board members were taking the research program.

In fact, that's confirmed by Exhibit 60, a memorandum by Mr. Osdene that Mr. Rosenblatt showed you yesterday; a memo where Mr. Osdene urges CTR should be controlled.

And it is not contradicted by Exhibit 1608, Mr. Wakeham's handwritten suggestions how to write grant applications, because Dr. McAllister showed you those suggestions were not followed by the Scientific Advisory Board.

By the way, you may remember Mr. Rosenblatt made a big deal of the note on that memo that said: Throw it away after you've read it.

Well, not only did we not throw it away, but we brought you the pages that plaintiffs had admitted that allowed the memo to be explained properly during Dr. McAllister's examination.

Now, we admit there are documents in evidence that show a variety of suggestions, many of them inconsistent, for changing CTR, but what you did not see was evidence that CTR was deterred from pursuing its central mission, or altered in a way that prevented it from doing research into smoking and health issues.

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Look at what happened in 1978, for example. You may remember Mr. Rosenblatt read to you Exhibit 3227, which Mr. Osdene expressed a conc rn about research by Dr. Abood into clinically a otable antagonists that CTR was funding. Dr. McAllister addressed this matter during his testimony. He told you this work could reasonably have been thought to have product development applications, which CTR was expressly prohibited from doing because the anti-trust laws barred tobacco companies from doing such product development work through a joint funding organization.

So what happened when CTR's lawyers expressed this concern? The Scientific Advisory Board members react acted vehemently. They said: Stay out of it; the science is our turf.

Result: A reasonable compromise, acceptable to the Scientific Advisory Board, was worked out, so this work could continue to be funded over the years, within the bounds of law.

And it was. As Dr. McAllister told you, CTR has supported nicotine research continuously since the 1960s.

And by the way, if you go to Exhibit 27592, which are all of the annual reports of CTR, its life work, go to the '79 annual report, Pages 40 through 42,

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you'll see the abstracts relating to Dr. Abood's work, as summarized and published from the scientific literature.

Did Mr. Rosenblatt tell you any of that yesterday? No. Despite these occasional critiques, the industry kept out of CTR's affairs.

As reflected in Exhibit 27423, when a committee was organized in 1974 to analyze the efficiency of all of the industry's outside research efforts, that committee, headed by a lawyer for one of the companies, stated: The independence of the Council for Tobacco Research should be respected at all times. It should continue under its present structure and should be independent of any supervision or control.

And you saw Dr. McAllister and Dr. Oparil, and you were read by plaintiffs the testimony of Dr. Glenn and Dr. Lisanti and Mr. Gertenbach, and every one -- not one of them told you that's exactly what happened.

So what remains of the plaintiffs' case against CTR?

Well, plaintiffs reach back more than 20 years to find Dr. Freddy Homburger, a scientist who had been funded by CTR since the 1950s. He had a contract with CTR to see if hamsters could get lung cancer from

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exposure to cigarette smoke.

Dr. Homburger claimed CTR tried to get him to publish his findings using what he said was a meaningless scientific term to describe what he thought were pre-cancer lesions in the hamsters.

One alleged incident in over 45 years, from one investigator out of 1,200.

And I use the word "alleged," because, as you watched the videotape of his deposition, Dr. Homburger's tale disintegrated when confronted with the documentary evidence from that time period.

Dr. Homburger admitted that he and his colleagues used the supposedly meaningless term, pseudoepitheliomatous hyperplasia -- I'm glad I got that out -- in their own publications over and over and over again.

Dr. Homburger admitted that rather than demanding that he use the term, CTR's staff actually questions its use. Dr. Homburger admitted that other independent pathologists disagreed how to read his slides. Dr. Homburger admitted that whatever condition his hamsters had, they did not get lung cancer.

Dr. Homburger admitted that he had been in a dispute with CTR over his contractual obligations, leading to the involvement of CTR's attorney. And

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Dr. Homburger admitted that his contract was terminated because CTR had decided to pursue another type of animal inhalation experiment.

And, finally, when confronted with correspondence demonstrating that he had not sent his draft manuscript to CTR until after the meeting where CTR's lawyers supposedly threatened him, Dr. Homburger had this to say as to his recollection of these 20-year old events:

(The following videotape was played:)

A. No. I don't remember anything. I'm -- at the moment I'm most confused and I cannot be relied upon.

MR. MOODHE: "I'm most confused and I cannot be relied upon."

Can you give anymore credence to this tale than Dr. Homburger is able to lend to it?

And one other thing. Even if everything Dr. Homburger said was true, the undisputed fact is that he says he published the results exactly the way he wanted, because he changed the data back.

So where is the misrepresentation? I suggest that the fact he published it exactly as he wanted to, is, instead, consistent with all of the other evidence that CTR respected researchers' freedom to publish.

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You've seen enough of scientists and doctors here and elsewhere to know that when an organization like CTR states right in its application materials that scientists will have complete freedom, a crescendo of complaints would have been voiced if there was any interference going on.

Instead, plaintiffs have offered you only one account, confused, filled with self-contradictions, from a 45-year history of funding research.

Let me ask you, how many people born in 1954 are likely to have had only one friend or one relative or one acquaintance make one complaint about them when they have 1,200 friends and acquaintances?

The evidence, instead, persuasively shows that CTR has adhered to its policies and let researchers publish what they want. This was dramatically demonstrated by Dr. McAllister who told you he'd identified hundreds of publications that invariably pointed a finger at cigarette smoking. He even gave you a selection of quotes, over the years, that certainly would have been suppressed by the industry, if suppression was going on.

And I will have flagged, with the Court's permission, the abstract relating to these articles that appeared in CTR's annual reports so you can see

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for yourself. And the annual reports are the principal way that CTR communicates what it's doing.

And what kind of suppression is going on when the Surgeon General of the United States cites CTR funded research 600 times? And that torpedoes Mr. Rosenblatt's assertion Monday that the tobacco companies knew back in 1954 that they were never going to fund anything detrimental to their product.

And on that score, Mr. Rosenblatt read to you a memo, Exhibit 3416, where Mr. Wakeham said that if CTR's research program were directed at trying to prove that smoking does not cause disease, it would be trying to prove a negative.

Now, do you remember that from yesterday?

Well, what he omitted to read to you was the next sentence that says: The lawyers and scientists will agree this task is extremely difficult, if not impossible. Nor did he read to you the first alternative approach suggested in that memo to proving the impossible negative, a program to search for the causes of diseases, especially those alleged to be caused by smoking, and that's what CTR's been all about.

The true picture is presented by what Dr. Leuchtenberger, another grantee who did animal

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inhalation work, said about her relationship with CTR: I appreciate your help, your constructive attitude, and the liberty which was given to me in carrying out the research and in publishing the result.

That was Exhibit 25975.

All of this bears out that CTR was absolutely faithful to making factual information available to the public on smoking and health issues, regardless of whether someone inside the tobacco company or anyone else thought it might be unwelcome news.

I submit to you that the reason that this research was published is because the true interests of CTR and the true interests of the tobacco company sponsors was to find the truth, the scientific truth that would make a difference to preventing and curing the diseases that affect smokers and nonsmokers alike, and that might help the companies make a safer product, but which did not make oversimplified conclusions that do nothing to advance these twin goals.

Now, what other criticisms have plaintiffs leveled against CTR? They talk a lot about special projects, but they never --

MR. MOSS: Your Honor, can we give the court reporter about 30 seconds? The court reporter is in pain. Can you give her 30 seconds?

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MR. ROSENBLATT: It's also 5:00.

THE COURT: Let's just take a short in-place breather.

(A brief three-minute recess was taken.)

THE COURT: All right folks. Let's come to order.

MR. MOODHE: We were beginning to talk about special projects, something plaintiffs have spoken a lot about, but they never bothered to bring a witness in here to tell you anything about special projects.

They did read depositions of CTR officials where you were told that special projects were research projects funded by the tobacco companies through CTR, in addition to its regular research budget, and that they were specific research projects undertaken to help the companies' trial lawyers defend lawsuits.

Now, as you've learned here, and I'm sure you r nize before getting here, there's nothing unusual or improper about lawyers retaining the services of physicians and scientists in connection with litigation or asking them to undertake specific research, whose results will assist juries like you in understanding complex, technical subjects, such as those we've been discussing here.

You think this stuff is easy? You need help,

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I believe.

It's normal courtroom procedure. So this whole notion of lawyer involvement in research undertaken for litigation being per se unlawful is ridiculous. It's no indication of anything unlawful.

Moreover, Dr. McAllister, as well as Mr. Gertenbach, explained the limited administrative roles that CTR played. Effectively, it was merely a mechanism for getting money to researchers taking advantage of CTR's expertise with research budgets and the funding bureaucracies of universities.

That, by the way, is why Dr. McAllister was trying to explain "front," by saying something like: Front me a quarter.

What he said, in the portion of the testimony that Mr. Rosenblatt did not read to you, was that, in other words, provide money, yes. And that's what CTR was doing.

And while Mr. Rosenblatt kept saying that Dr. McAllister gave a different answer than Dr. Oparil about the meaning of the word "front," Dr. McAllister agreed that the outside lawyer had used the word negatively. He didn't say otherwise.

And finally, Dr. Oparil specifically testified that she did not agree with that description

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of CTR and special projects. She told you it was good research by reputable scientists that was published in peer-reviewed journals.

You should also know that the evidence is that these projects did not divert one dollar or in any way interfere with the grant program administered by the Scientific Advisory Board. The evidence shows the Scientific Advisory Board had been advised of the existence of special projects, but they were insulated from it so their judgments about the grant applications would not be in any way influenced.

And by the way, there was no inconsistency among Dr. Glenn and Dr. McAllister and Mr. Gertenbach about the scientific director's role in special projects.

Mr. Gertenbach described the process that had been followed over the years, but Dr. Glenn and Dr. McAllister both made clear -- what you even heard when Mr. Rosenblatt read you the testimony -- that special project funding had ended by the time they became scientific directors. So there's no inconsistency in their saying: We didn't do anything with them.

And that's why Dr. McAllister didn't bother to look in the files relating to special projects.

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They were history. He did look at them, though, once he started to get it, and was asked questions by plaintiffs' lawyers.

So what then was improper by special projects?

Well, Mr. Rosenblatt promised you in his opening statement that he was going to prove that the lawyers suppressed the research that was done. But when it came time to put up the proof, what did you hear? Exactly nothing. No witness came in here and testified to that effect. No proof was offered to prove that fact.

In fact, Dr. McAllister came and told you that the agreements with the special project researchers gave the researchers the right to publish their research where they wanted to and when they wanted to. Publication was contemplated and expected.

And more amazingly, plaintiffs themselves entered into evidence Exhibit 371, a list of more than 300 publications resulting from special projects funding.

And as I mentioned, Dr. Oparil explained that she reviewed this body of work, found it to be good, quality work, done by independent, reputable scientists at leading universities, some of whom she knew and had

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worked with over the years and whose scientific integrity she vouched for.

Here's where it was done: Leading universities across this country.

And finally, Dr. McAllister explained to you that some of that research, like some of the grant research, came to conclusions that could be interpreted as supporting links between smoking and disease.

And both Dr. McAllister and Dr. Oparil confirmed that the type of research that was funded by special projects was consistent with the idea that CTR would finance research into all phases of tobacco use and health, and make factual information available to the public, the two purposes that Mr. Rosenblatt confirmed to you were stated in the original bylaws.

By the way, Mr. Rosenblatt failed to tell you -- because he probably didn't know -- that the bylaws, which are filed with the State of New York, were amended in 1971 to clarify specifically dealing with the funding of special projects. And you can look at that, Exhibit 1850, little a.

Now, having spent days reading through the materials in the special projects files, both Dr. Oparil and Dr. McAllister told you they found nothing that proved troublesome to them as scientists,

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despite the involvement of the lawyers.

By contrast, plaintiffs produced not one witness who had even bothered to look at the peer-reviewed articles, let alone spent one minute looking at the internal files of CTR that were produced in litigation to the plaintiffs.

We gave you testimonial and documentary evidence. Plaintiffs gave you nothing but argument.

Plaintiffs' further assertion that CTR was just a public relations gimmick can't be reconciled with this substantial scientific record.

In fact, Mr. Rosenblatt gave you the best evidence of this on Monday, when he reminded you that Philip Morris' top public relations person, Ellen Merlo, said she'd never heard of CTR.

How could that be, if CTR is nothing but a public relations operation?

That's why it's also no surprise that Mr. Chilcote, from the Tobacco Institute, testified that TI and CTR had no relationship.

Now, was there a public relations aspect at all to CTR? Yes, particularly in the early days. There were two purposes stated in those bylaws, one of which was to make factual information available to the public. That's what CTR was doing.

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And if you want to call that public relations, then go ahead and say so. Do it. But don't call it fraudulent and don't say it exceeded the purposes for which it was set up.

And there was nothing secret about CTR's relationship with the public relations firm of Hill & Knowlton. Exhibit 25983, which is the letter that's 25983, the letter that was sent to the Department of Justice in 1954, enclosed the original statement of purpose, and the original statement of purpose disclosed the retention of Hill & Knowlton.

And if you look at 1514-B, you'll see that many of CTR's early press releases appeared on Hill & Knowlton's letterhead.

There's nothing wrong with maximizing your ability to communicate a message effectively to an audience, as long as the message is truthful, and CTR's message was always truthful.

The plaintiffs never proved that any press release contained a false statement of fact. The best Mr. Rosenblatt could manage was to show you a 1960 form letter, Exhibit 896. But he failed to say what Dr. McAllister had already told you: There's no indication that the draft letter was ever sent out, and that, in any case, it was a fair statement about the

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state of science back then.

And Mr. Rosenblatt also read to you from Exhibit 3312, a memo written by some British scientist who met with CTR and some industry officials in 1958, and reported that supposedly all of these people in the U.S. agreed that smoking causes disease.

But Mr. Rosenblatt did not read you a few lines down, where the British scientist stated that the Scientific Advisory Board of TIRC and a group at the National Cancer Institute, do not accept a case that -- that a case has been made that tobacco smoke is directly carcinogenic to the human lung.

And most interestingly, the Scientific Advisory Board minutes contain the following further contradictory accounts of what was discussed with the British scientists.

Those minutes, which are Exhibit 37107, report that the British scientists told SAB member, Dr. Leon Jacobson, whom you recall had developed radiation as a therapy for cancer, that the British scientist did not embrace the conclusions on causation expressed by the Medical Research Council, and that Dr. Jacobson did not think there was any relationship between smoking and lung cancer.

So you've got two contradictory accounts of

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what was said in these discussions.

Every statement that CTR made was outgoing. That's why someone might call it public relations. Others could disagree and challenge those interpretations. But they were just as free to do so as CTR was.

Has CTR been good public relations for the industry? Sure. But only because of the merit of the work it's done over the years.

Yesterday, Mr. Rosenblatt read you a portion of Exhibit 796 where Mr. Addison Yeaman, while he was with B&W, said that CTR functioned as a public relations operation; but in that same document, Mr. Yeaman characterized the Scientific Advisory Board as undefiled. In other words, uncorrupted.

And I want you to compare that document to Exhibit 349, after Mr. Yeaman joined CTR, where he said: It should be emphasized that the Council has no propaganda function of any kind or to any degree. The work of the Council is of value only to the degree that its scientific integrity is unimpeachable.

Likewise, that's why Dr. McAllister responded, when Mr. Rosenblatt showed him the reference in Exhibit 60, to CTR being an industry shield: If doing good science and getting it published, pushing

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the frontiers of knowledge, if that offered a shield in his feeling, then so be it.

Dr. McAllister and Dr. Oparil were justifiably proud of their association with CTR, and there's no reason why the companies, who organize it -- organized and funded CTR over the years, should not be given their due credit for making possible the good work that CTR has done.

Now, there's one last topic I need to cover with you. You may remember a witness by the name of Mr. Eric Solberg, whom plaintiffs put on in this case; somebody Mr. Rosenblatt omitted from his long list of witnesses yesterday. Maybe he forgot. Maybe he wanted you to forget the embarrassing testimony Mr. Solberg gave here.

Mr. Solberg was the young man who files the tobacco advertisements at Doctors Ought to Care. He came to Miami and accused the American Medical Association, which is not in this courtroom to answer the charge, of selling out to the tobacco industry, allegedly agreeing to oppose warnings in 1964 in exchange for money to fund scientific research, unrestricted funding, to fund research on smoking and health matters.

Mr. Solberg, who's training is in how parts

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of the bodies move, like when you play tennis or golf, I think were the two he mentioned, he based that scurrilous accusation just on reading some materials.

But the complete amateurish, the complete bias and lack of impartiality of his approach was betrayed by the fact that he relied almost exclusively on documents collected and sent to him by plaintiffs' attorneys suing tobacco companies, and that he had never looked at the AMA internal documents dealing with this subject, which anyone following unbiased historical methods would have done by leveling such a serious accusation.

In fact, the first time Mr. Solberg saw an AMA document was when I showed him the AMA's official digest of its proceedings right here before you. And that digest flatly contradicted Mr. Solberg's claim that the AMA leadership had disregarded the membership by not embracing the 1964 Surgeon General's Report.

The digest showed it actually was the elected representatives of the AMA's House of Delegates, a year after this whole dispute had erupted over the AMA's position, who voted not to endorse the Surgeon General's position.

You heard Mr. Solberg's only response: Maybe the digest is falsified, just like he speculated that

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maybe someone forged Dr. Blasingame's signature on the AMA letter that was sent to Congress, that took the position that warnings were unnecessary, in view of the widespread awareness of the health risks associated with smoking.

Another sensational allegation that withers away, because you heard that the AMA never retracted the letter, even after being criticized for sending it, but, instead, defended the letter in the pages of its own journal.

No wonder Mr. Solberg's former colleague at Doctors Ought to Care, Dr. Thomas Houston, who now works with the AMA, will not talk to him.

MR. ROSENBLATT: Objection, Your Honor. There's zero evidence of that in the record.

MR. MOODHE: I'll show the transcript reference.

THE COURT: Well, I'm really not sure myself, to be perfectly honest, but the jury will rely upon their own recollection as to whether there was evidence of that nature.

MR. MOODHE: Are you really going to credit Mr. Solberg's view of these wild, contradicted accusations? Are you going to credit an accusation by a man who thinks that congressmen corrupt the NCI grant

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process, who thinks distinguished scientists who served on the Surgeon General's Advisory Committee were corrupted by research money made available to the AMA, who thinks that the National Cancer Institute was wrong for trying to identify the harmful elements in tobacco smoke so that a safer cigarette could be made?

Should you trust the judgment of a man who faults the AMA for a ·tir ; $18 million to fund unrestricted, independent research into smoking and health issues, but finds nothing wrong in accepting $1 , fr m an antitobacco plaintiffs' attorney not to do ı search, but to pay the rent and his salary while he's testifying against the tobacco industry?

Like much of plaintiffs' case, Mr. Solberg conjures up sinister motives for every good deed of the tobacco companies and CTR. The industry cooperated with the public health community by giving those millions of dollars to the American Medical Association, for unrestricted research, research for which the industry had no control over the results that were published, and published, they were, as Mr. Solberg told you.

But there are other examples of cooperation. Exhibit 27681.

Dr. McAllister showed you some of the

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correspondence between CTR and the Surgeon General's Advisory Committee in 1962 and 1963, where CTR was constantly responding to requests for help in pulling information together for the Surgeon General's Advisory Committee.

Exhibit 27754, correspondence reflecting similar support and cooperation with other public health agencies, including the Public Health Service, the National Cancer Institute, the American Heart Association, and my colleagues have described and will describe other evidence of the defendants' cooperation with the public health community.

And in a minute -- well, I guess not in a minute -- in the morning, Mr. Reid is going to spell out the second major leg of that cooperation: the talent, the money, the energy that went into the effort to make a cigarette as safe as a cigarette could be made, building, in part, on what CTR and others had accomplished in the biomedical field.

Ladies and gentlemen, you'll notice that throughout my discussions with you, I have kept The Frank Statement up here beside me. That's because I want you to know that regardless of whether we were free to do so or not, neither CTR, nor its member companies ran away from the statements made about what

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CTR would do.

And contrary to what Mr. Rosenblatt said on Monday, we did not run away from smokers who became sick. We tried to get meaningful research done, that, in fact, might cure the diseases that they may have, or keep them from getting those diseases.

Nor have we run away from the allegations that plaintiffs have made in this case. We confronted them. We've dealt with them as comprehensively as we could, whether those allegations came in the form of testimony or documents.

And I've done my best to anticipate matters that Mr. Rosenblatt did not raise during the last two days, but may raise in rebuttal, when I have no chance to respond.

We came here to give you the truth and the factual details to persuade you of that truth, so that you, yourselves, can figure out who's been straight with you about CTR.

We came here to protect the reputation of CTR and that of the men and women who have served CTR as employees, as scientific advisors, and who have conducted research with CTR funds, like Dr. Oparil.

We came here to tell you that our sponsor companies, despite some criticisms and skepticism they

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had over the years, stayed with CTR for over 45 years and let the independent members of the Scientific Advisory Board direct the research they thought best and supported them with ever increasing dollars.

We came here not just to stand up to the vilifications, but to win vindication from you.

And we came here to ask you to reject all of the allegations that plaintiffs have made.

We came here to ask you to lift the cloud that's been cast unfairly over all these outstanding scientists and their accomplishments, and, instead, to recognize their accomplishments, as well as the support the companies have given them in their efforts to help find preventions and cures to diseases that very sadly afflict smokers and many others, as well.

We came here trusting in your judgment, and we wait your verdict.

Thank you.

THE COURT: Thank you, sir.

All right. I think this is the time to take our evening break, recess.

We will return to the courtroom tomorrow at 9:15 for you folks; 9:30 for attorneys and personnel, unless some other matters that come up which requires our attention earlier. I don't know if it will or not.

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Considering the history of the events in this case, you never know.

All right. We will be in recess until tomorrow morning at 9:30.

(The jury exited the courtroom.)

MR. ROSENBLATT: Just scheduling. What I'm planning on doing is, and I'd asked Mr. Heim, I'm figuring if they don't take all day tomorrow, they'll take nearly all day. I certainly wouldn't want to start my rebuttal at 3:00 or 4:00, something like that, so I'm assuming I'm going to do my rebuttal Friday morning.

THE COURT: I'm sure they'll be all day.

MR. ROSENBLATT: I am, too.

MR. HEIM: Actually, we will be longer than all day. My timekeeper tells me we've --

THE COURT: We've lost some time.

MR. HEIM: We'll go over into Friday morning, probably not too long.

MR. ROSENBLATT: Okay.

MR. HEIM: So I think --

THE COURT: I think we'll do another about 15 or 20 minutes, I think.

MR. HEIM: I think we had, according to Mr. Newsom, who kept his time, he actually has five

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minutes of difference than Mr. Kirby, but roughly five and a half hours we have today.

THE COURT: All right.

MR. HEIM: So figure it out.

(Discussion off the record.)

THE COURT: Ladies and gentlemen, we'll be in recess until tomorrow.

(Court was adjourned at 5:30 p.m.)

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